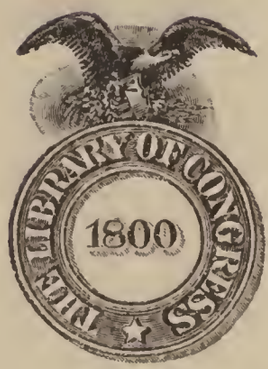

REFORMS IN LEGAL PROCEDURE

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-SECOND CONGRESS

SECOND SESSION

AMERICAN BAR ASSOCIATION BILLS

H. R. 16459, H. R. 16460, AND H. R. 16461

AND

H. R. 18236

(Covers subject matter of H. R. 12365)

TO ALLOW AND REGULATE AMENDMENTS IN JUDICIAL PROCEEDINGS IN THE COURTS OF THE UNITED STATES

AND

H. R. 16808

TO AMEND THE JUDICIAL CODE

AND

H. R. 17249

TO AMEND SECTION 237 OF THE JUDICIAL CODE

JANUARY 25, 1912

WASHINGTON
GOVERNMENT PRINTING OFFICE
1912

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

HENRY D. CLAYTON, Alabama, *Chairman.*

ROBERT L. HENRY, Texas.
EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
WILLIAM W. RUCKER, Missouri.
WILLIAM C. HOUSTON, Tennessee.
JOHN C. FLOYD, Arkansas.
ROBERT Y. THOMAS, Jr., Kentucky.
JAMES M. GRAHAM, Illinois.
H. GARLAND DUPREE, Louisiana.
MARTIN W. LITTLETON, New York.
WALTER I. MCCOY, New Jersey.
JOHN W. DAVIS, West Virginia.
DANIEL J. MCGILLICUDDY, Maine.
JOHN A. STERLING, Illinois.
REUBEN O. MOON, Pennsylvania.
EDWIN W. HIGGINS, Connecticut.
PAUL HOWLAND, Ohio.
FRANK M. NYE, Minnesota.
GEORGE W. NORRIS, Nebraska.
FRANCIS H. DODDS, Michigan.

J. J. SPEIGHT, *Clerk.*
C. C. BRANNEN, *Assistant Clerk.*

REFORMS IN LEGAL PROCEDURE.

AMERICAN BAR ASSOCIATION BILLS, H. R. 16459, H. R. 16460, H. R. 16461, AND H. R. 18236 (COVERS SUBJECT MATTER OF H. R. 12365), TO ALLOW AND REGULATE AMENDMENTS IN JUDICIAL PROCEEDINGS IN THE COURTS OF THE UNITED STATES; H. R. 16808, TO AMEND THE JUDICIAL CODE; AND H. R. 17249, TO AMEND SECTION 237 OF THE JUDICIAL CODE.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, January 25, 1912.

The committee met at 10 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The bills upon which the hearings were had are as follows:

[H. R. 16459, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

DECEMBER 20, 1911.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend section two hundred and thirty-seven of an act approved March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of the act approved March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary," be, and the same is hereby, amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question

the validity of a treaty or statute of, or an authority exercised under, the United States, or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the grounds of their being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in the court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

[H. R. 16460, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

DECEMBER 20, 1911.

Mr. Clayton ntroduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend the act of March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of March third, nineteen hundred and eleven, entitled "An act to codify, revise, and amend the laws relating to the judiciary," be, and the same is hereby, amended by inserting after section two hundred and seventy-four, at the end thereof, two new sections, to be known as section two hundred and seventy-four A and section two hundred and seventy-four B, as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleading which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

[H. R. 16461, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

DECEMBER 20, 1911.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To regulate the judicial procedure of the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and sixty-nine of the act approved March third, nineteen hundred and eleven, entitled

"An act to codify, revise, and amend the laws relating to the judiciary" be, and the same is hereby, amended so as to read as follows:

"SEC. 269. That no judgment shall be set aside, or reversed, or new trial granted, by any court in the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for any error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point may require."

[H. R. 18236, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 18, 1912.

Mr. Clayton introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To allow and regulate amendments in judicial proceedings inthe courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

SEC. 2. That where, in any suit brought in or removed from any State court to any district court of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal.

The CHAIRMAN. The committee has met this morning for the purpose of hearing Mr. Wheeler and others on H. R. 16459, 16460, and 16461, and while Mr. Lehmann, the Solicitor General is here, I shall, if we have time this morning, ask him something about H. R. 12365 (now H. R. 18236), that I called your attention to the other day. That relates to two matters: One is where the party has mistaken his remedy, conducted the litigation, and afterwards it is found out he has gone into the wrong court, rather than to have him dismissed from the court he is permitted to have his cause transferred to the proper court upon such terms as to cost as the court may impose; and the second object of that bill is where diverse citizenship is defectively alleged, which, of course, can be taken advantage of in the appelate court to permit the allegation to be amended even in the appellate court, so as to properly aver the diverse citizenship.

We will hear Mr. Wheeler first on the bills that I have already enumerated, and which I introduced at his request, he having brought them at the instance of the American Bar Association.

STATEMENT OF HON. EVERETT P. WHEELER, OF NEW YORK, APPEARING FOR THE AMERICAN BAR ASSOCIATION.

Mr. WHEELER. Mr. Chairman and gentlemen of the committee, these three bills that are before you are drawn by a special committee of the American Bar Association. We have been considering them for four years. Complaints that came to us from various States and various interests, the complaints of employees and employers alike, in regard to the delays of the law, in regard to the frequent occasions of the miscarriage of justice by reason of the disposition of a case not upon the merits but upon some technical objection that was quite irrespective of the merits. We have endeavored to deal with that situation in a conservative way. It was to provide for three several difficulties that these three bills were drawn.

I may say that 16461 has been before three successive Congresses, and I will take that up a little later.

The first bill (H. R. 16459) proposes to change section 237 of the Judicial Code so as to provide that if a decision is rendered in the highest court of a State that an act of that State is in violation of the United States Constitution, there may be a writ of error from the Supreme Court of the United States. As you are aware, under the present law such a writ of error can only be taken in such a case when the decision denies the claim made in the State court and sustains the validity of the State statute.

We know historically it was thought that no State court would ever decide that a State statute was in violation of the United States Constitution, except in a very clear case; that therefore it was unnecessary to do more than give a right of review where the State statute was sustained. But in the great expansion of the country and the great increase in judicial business this function of the appellate courts has been developed. So we find, as a matter of fact, that the courts are dealing with the Constitution and declaring statutes to be in violation of it more freely than they did at first. None of us can deny that, and none of us can fail to see that there is great public dissatisfaction. As a lawyer I regret that that dissatisfaction should sometimes have found expression in somewhat violent language. We all of us desire that the courts should maintain what they have had in the past—the respect of the whole community. But we are confronted with the situation that the diversity in the decisions in different States on constitutional questions is a grievance. It seemed to your committee and to the association that this was a just grievance.

One recent illustration that has brought the matter very much to the front and excited, I may say, universal attention throughout the country is the decision of the Court of Appeals of New York in the Ives case.[1]

There is a general tendency toward ameliorating the State law as the judges have made it in regard to the liability of employers. Such a law, very carefully considered, was adopted in the State of New York. The point was made that it took away the property of the employer without due process of the law, because it imposed a certain liability irrespective of fault.

---

[1] 201 N. Y., 271.

Mr. MOON. And thereby violated the fourteenth amendment.

Mr. WHEELER. Precisely. I was one of the counsel in that case. I was not called in on behalf of the original parties to the litigation. It excited great interest, and the Federation of Labor asked me to put in a brief, which I was glad to do. There is no time to discuss and there is no propriety in discussing whether the decision which was made was right or wrong. The court held that the statute was invalid. Yet we find right across the Hudson River that the courts of first instance in New Jersey have held a similar statute to be valid. The courts in Wisconsin, in Montana and in the State of Washington have held a similar statute to be valid.

Mr. MOON. And those courts were the supreme courts?

Mr. WHEELER. Yes; they were the supreme courts of their respective States. The result of that is that the Constitution of the United States means one thing in New York and another thing in New Jersey, Wisconsin, Montana, and Washington. That is not a situation that commends the court or the law to the average man. You can explain it to a lawyer; we understand how it has arisen, but to a man who is not a lawyer and who looks at it as a man in the street does, it seems indefensible. I have heard it suggested that this law if passed would throw a burden upon the Supreme Court, but it seems to me that the most important duty and function of that court is to decide questions under the Constitution of the United States; that this is its original jurisdiction conferred by the Constitution itself. Whichever way such a question was decided in the court below the case was "a case under the Constitution," section 2, Article III, of the Constitution itself in defining the jurisdiction of the Federal courts declares:

> The judicial power shall extend to all cases in law and equity arising under this Constitution.

Moreover it seems to us that inasmuch as the cases are generally typical cases, that the decision of the Supreme Court, the highest tribunal, in one such case would settle them all, and the court would not, after all, have such an influx of appeals from this source.

There would be, in short, one test case which would settle the law for the whole country, and the State courts would enforce it according to the decision at Washington.

Mr. MOON. Mr. Wheeler, let me ask a question or two. The theory of the fathers in framing the Constitution upon that point I think was this: That they wanted to impinge upon the courts of the State just as little as possible, and that the two courts were to be kept independent, the one absolutely supreme in its own scope, and that whenever a question as to the constitutionality of an act or the violation of the Constitution of the United States was involved in a State court, and a decision there was that the Constitution of the United States was involved, and that the Constitution of the United States prevented it, then the Federal question arose and the decision was against the United States and the decision should go to the United States Supreme Court, but just as they had decided that the constitutionality of the act, that the act was unconstitutional, that it should be limited then to the jurisdiction of the States.

So far as I am concerned, I do not yet see any important reason why that should not be done, and yet no doubt inquiry ought to be

given to it to see whether there is not some important principle which we are overlooking involved in that thing, and I do not believe that any one concrete case could justify us in changing the existing law if there was a principle involved. I would like to investigate it a little further. I do not now see any objection to it so far as I am concerned, but there might be.

Mr. WHEELER. Next let me say a few words in regard to bill 16460. That provides that in case it appears in the course of litigation that an action has been brought on the wrong side of the court—at law when it should have been in equity, or in equity when it should have been in law—that the court shall permit such an amendment to the pleadings as to obviate the difficulty. It provides in the second place that equitable defenses may be interposed in suits at law. This is really conforming the practice of the Federal courts to the practice that prevails in most of the States, in two-thirds of them at least. It is now permissible in them to obtain equitable relief on an answer without the necessity of a cross bill.

If a suit of law is brought, for example, on a contract, it is permissible by answer to pray that there be a reformation of the contract. I think I may speak for the bar of all these States; it was their unanimous expression at our last bar meeting that this practice is a great convenience. It saves time. I tried, for example, myself, last March, in New York a case where an action was brought on a promissory note, and defense was set up in equity that in the Federal courts would have compelled the filing of a cross bill for equitable relief. The court tried them both. Under our practice, which I think is the practice of most of the States where this general principle is adopted, the court ordered the issues raised by the equitable answer to be tried before the same jury that tried the issues on the note. I am told by one of my Georgia friends, Maj. Cummings, of Augusta, that in all equity cases in that State the issues of fact are tried before a jury. We all know that under the old equity practice if a chancellor was in doubt upon an important question of fact, he could permit issues to be tried by a jury. All this procedure is flexible; it is all within the molding power of the court, and it does seem unreasonable that the Federal courts should be the last to permit such a flexibility of practice.

In the Federal courts, as we all know, the same judge, the same individual, sits in one case when there is written at the top of the title "At law"; and again in another case where the title reads "In equity"; and then, in a third, where the title reads "In admiralty." You have the same individuals deciding the equity, the law, and the admiralty. Why should counsel be obliged, if it turns out that there is some equitable point in the law case or some legal point in the equitable case, to bring a separate suit?

Mr. MOON. Judge, has it not always been decided by the Supreme Court of the United States that in the jurisprudence of the United States it is always recognized—the distinction between law and equity is under the Constitution a matter of substance as well as form and procedure, and, accordingly, legal and equitable claims can not be blended together in one suit? It seems to me there is a long line of cases establishing that fact—regarded under the Constitution as a matter of substance as well as form.

Mr. WHEELER. We have considered that very subject, and you will find in this report which we are going to hand up to the committee a careful consideration of it. The language of the Constitution is this (sec. 2, Art. III):

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority.

This recognizes the intrinsic distinction between the principle of law and equity. You get damages in a suit at law; you get specific relief in your equity suit; and yet from the beginning—the judiciary act of 1789—we have intrusted the administration of those systems to the same judge. Why should it be any more an infringement to permit that same individual, in the same court, to mold the practice so as to administer either species of relief without the necessity of a new suit? In some of these cases that are referred to the decision was based on the existing statute. This statute does seem to require that the old methods which followed the English practice should still be followed; yet in a recent case, referred to on page 16 of our report (Schurmeyer *v.* Connecticut Mutual, 171 Fed., 1), the Circuit Court of Appeals of the Eighth Circuit held that even under the existing statute it was permissible where a suit had been brought on the wrong side of the court to mold the pleadings without compelling a new suit to be brought. But that has not been the general practice in the circuits, and the one effect of this act, if adopted, would be to assimilate the practice in all of them to that in the Schurmeyer case.

We do not undertake to break down the distinction between law and equity, but simply enable the court to mold its practice so as to administer the relief appropriate in either case without the necessity of a separate suit or of a cross bill. Perhaps some relief provided in this bill might be granted by rule of the Supreme Court. But I am informed that, inasmuch as that part of it which deals with cases at law does not come within the broad power of making rules conferred by law in that court, it would be quite content if this broader power should be given so as to enable the court to deal with both sides of the question. The court undoubtedly could say, "By an amended equity rule you can get relief in an answer to a bill in equity, which at present you can only get by cross bill." That is within the present power of the court. But they have no power to say, "You can set up an equitable defense in a suit at law." And that is what we ask.

Mr. MOON. Of course, they have said repeatedly that you can not.

Mr. WHEELER. Yes; under the present statute, but they have never held it under the Constitution—simply under the statute. Those cases are all collected and referred to in that part of the report which deals with that subject, which I have handed up to the committee, that begins on page 11.

Now, let me come to the third of our bills. That is in a different position. That bill is the one to which I referred as having been previously before Congress. It passed the House of Representatives unanimously at the last session. It went to the Senate, but, unfortunately, there was not time to bring it to a vote there, and so it lapsed. Let me make an observation in regard to the framing of this particular act. I think, perhaps, in drafting it, it would have

been better if the bill had provided that instead of amending "section 269 so as to read as follows," it had been provided that that section should "be amended by adding at the end thereof the following."

Mr. MOON. The bill as drawn is not right; it should not read that way.

Mr. WHEELER. I think it should be amended in the committee, because the present section 269 is the old clause that gives power to grant new trial. There is no reason why we should take away that granted power expressed in the present statute. Therefore I would propose the amendment as an addition to section 269—not as a substitute for it.

Mr. MOON. You would have to put in the whole section anyhow, because as amended it would not read this way.

Mr. WHEELER. The object of this particular bill is twofold. In the first place it gives to the court of appeals the power to deal with the case upon the merits, without regard to technical errors in the pleading or procedure that do not affect the merits. In the next place, in the final clause, it gives to all the Federal courts the power that is possessed in a number of States, that my friend Mr. Moon has informed us on a previous occasion exists in Pennsylvania. It does exist in New York. On the other hand, Mr. Whitman, of Illinois, tells me it does not exist there. Under the present statute the State court practice in suits at law is the model for the Federal courts, so that the circuits have to follow the practice of the States in this respect. This section would assimilate the practice throughout the country and give to the Federal courts everywhere the power to take a verdict on the facts, reserving its decision on the law. That seems to us manifestly reasonable. It obviates the necessity of frequent new trials, which only prolong litigation and tend to divert the examination of the court from the real merits of the case.

Mr. MOON. Do not many of the judges do it anyhow?

Mr. WHEELER. In some circuits they do and others they do not.

Mr. WHITMAN. I think they could hardly do it under our statute in Illinois. I have never known of it being done.

The CHAIRMAN. Could not they bring a special verdict on a question of fact?

Mr. WHEELER. Oh, yes.

Mr. DAVIS. The bringing of a special verdict upon a question of fact does not exist with us.

Mr. MOON. It is the practice in some of the Federal courts.

Mr. WHEELER. That is just it; it does exist in some circuits, but it does not exist in others. We have pointed out in this brief numerous cases where, by reason of the ordering of a new trial instead of granting judgment upon the merits, a case has been sent back for a second trial. In the Hillmon case in the Federal courts (145 U. S., 285; 188 U. S., 208) the second reversal of judgment in the court below was 23 years after the suit began. In the case of Springer *v.* Westcott (166 N. Y., 117) there were four appeals, and the entire recovery was only $900—for the contents of a trunk. It is obvious that the expense of the litigation far exceeded the amount finally recovered.

In another case, Walters *v.* Syracuse Rapid Transit Co. (178 N. Y., 50), there were four appeals.

And so it comes to this, that on the second or the third trial you have the double difficulty. In the first place it is certain that the memory of the honest witnesses will not be as accurate as it was when the facts were fresh. But suppose you have a dishonest witness, and he is willing to shape his testimony, as they sometimes do—as the court in the Walters case says they often do—to meet the exigencies of the situation created by the opinion of the court, under the present method, you do great injustice to litigants.

Mr. Moon. In personal damage cases I think it is pretty often.

Mr. Wheeler. It often happens. There can be no question of that. Take one of those cases. Suppose the judge is in doubt as to whether or not the complaint or suit (however you phrase it in the different States) should be dismissed; suppose questions of law are raised as to whether the necessary preliminaries have been satisfactorily complied with, he should take a verdict on the facts and reserve his decision on the law? I may illustrate by two cases in volume 160 of the New York Reports. Exactly the same question arose in each. The judges dealt with them differently. In one case he dismissed the suit; in the other case he took a verdict on the facts and reserved his decision on the law. When the first case went to the court of appeals they held he was wrong on the law and were compelled to order a new trial; in the second case, where a verdict had been taken, the court of appeals reinstated the verdict and ordered payment upon it.[1]

The whole effect, gentlemen, on this statute as we propose is to give validity and dignity to the verdict of a jury. All practicing lawyers know that juries are not so much influenced by these fine points of evidence, the technical objections raised on the trial, as many seem to suppose. I have often talked with jurymen after a verdict, and I uniformly, without exception, found this to be the case—the fine points of objection to this or to that did not weigh with the jury a particle. Really you would get a fairer verdict and you certainly would get a more stable one by permitting the practice here proposed than you would do under the present system.

Let me make one more suggestion, for which I am indebted to Attorney General Williams, who was one of the veterans when we had our meeting at Seattle and discussed this very question, and who has since departed to another world. "Why," he said, "gentlemen, as long as these technical objections have an effect on an appeal, as long as courts on appeal reverse judgments because of them, so long will lawyers feel themselves bound to take them." The public censures us for making technical objections, but a lawyer is bound to do his best for his client, and as long as he can take the objection and have it considered in a court he is sure to do it. "But," he added, "if you take away the effect of these objections, if you provide that the appellate court shall not decide the case because of a purely technical error, the lawyers will not make them any more. This would leave the case free to be dealt with upon the merits."

It seems to me that is always the position we want to be in. Of course, every man has been called upon to interpose legal objection when he was conscious that the real merits of a case were with the adverse party. That is our duty. Our client has a right to be heard

[1] Missano *v.* Mayor (160 N. Y., 123); Sheehy *v.* Mayor (160 N. Y., 139).

upon his case whatever it is. But that is a painful position for a lawyer.

The true position we all want to occupy is to have a good case, strong upon the merits, and be in a position where we can push it to judgment as soon as ordinary conditions will permit. Let us consider this legislation from that standpoint, which is the standpoint of the public.

Mr. Solicitor General Lehmann is interested in these bills from the legal standpoint. He was chairman of this committee of which I am now chairman, and I am following in his illustrious footsteps. Mr. Whitman, of Illinois, and Mr. Saner, of Texas, are here, so that we represent, we may say, all the great States east of the Rocky Mountains. I wish we could have had Attorney General Williams here from Washington to tell the story that I have recited for him to you. I do believe we represent a universal sentiment, and we hope this House, as the last, will embody it in legislation.

The CHAIRMAN. We will now be glad to hear from the Solicitor General.

STATEMENT OF HON. FREDERICK W. LEHMANN, SOLICITOR GENERAL OF THE UNITED STATES.

Mr. LEHMANN. Mr. Chairman and gentlemen of the committee, Mr. Moon has made some inquiry of me with respect to the bills here which provide for the administration of legal and equitable remedies in the same bill. I began the practice of law in Iowa. The code that was then enforced was that of 1860, and so long ago as that, more than 50 years ago, the State of Iowa recognized it and applied the procedure that is proposed in these bills. That was done under a constitution which is essentially, so far as the matters here involved are concerned, like that of the United States; that is to say, a constitution which creates courts which have jurisdiction at law and in equity, and the rulings of the court on that constitution have been that the substance of law in equity must be obtained distinctively. Nebraska has similar provisions, and so has the constitution of Missouri, as Judge Rucker knows. In all of those States we have but one form of action, but we administer the remedies either legally or equitably, as the nature of the case may require, and we have no real controversies. Of course, where the line of distinction between law and equity is broad, there is not likely to be any mistake of either party with respect of it. When you come to that twilight land where it is debatable—we do not have the debates in those States, because we can just take it either way as it may suit the parties. If nothing but a money judgment is asked in a case, a jury can administer the remedy, even though there may be equitable grounds for relief. On the other hand, if the case is purely one of legal cognizance, and we try it as a legal case, nobody is permitted to complain and ought not to——

Mr. MOON. Well, Mr. Solicitor General, the converse of that could not be absolutely—that is, you could not administer common-law rights under equitablbe forms without violating the seventh amendment of the Constitution.

Mr. LEHMANN. That you could do only by consent.

Mr. MOON. Yes; only by consent.

Mr. LEHMANN. But we avoid controversy upon that, because men are not looking for nice distinctions between law and equity, and we simply get rid of a whole lot of formality; as you say, if the man insists upon his rights to trial by jury, of course, he gets it, and if he has consented to a trial by court he can not raise the question that the suit was brought in the wrong form, and that is what we propose to do here by this bill—that if the suit is brought in the wrong form it shall not be dismissed, but it shall simply be recast in the proper form and proceed in the same tribunal. The difference between our Federal practice and our State practice is simply this: Both in the State courts and in the Federal courts the same man sits as judge at law and as chancellor.

Mr. MOON. That is not so in some States.

Mr. LEHMANN. Take the Western States, that is true in part of them. Of course, New Jersey has its separate courts of equity; but in the State of Missouri the same man sits as a judge at common law and as chancellor. He has the same docket, or he may have two dockets, and the case may be labeled "at law" or "in equity." It is in Iowa; it is not in Missouri—you do not have to label it. When we come into the Federal courts, however, having removed a case which was of equitable cognizance, and brought it in the way in which we do in the State courts, we have but one form of action, and the original pleading is called a petition whether at law or equity. When we come to the Federal court we must recast it. If we have made a mistake in the State court and brought a suit as being at law when it should be in equity, and that case is removed to the Federal court, we are thrown out altogether. We can not recast the form. If we have made a mistake on the equity side and, say, if you institute your Federal court at law when it should be equity, you can run along, incur a great deal of expense, and at the very last the ——— may be taken or the court may take it sui supplanta, and out you go.

On what? On manner of form. And the parties are punished for what? Not for any fault of their own, but for the fault of the lawyers who are accredited by the court as competent to guide them. And the essential bias of your formal, technical procedure is that you create a body of learning which is of no interest whatever to the parties litigant, and which the high priests who are supposed to be educated in the mysteries are themselves incapable of understanding. Then you do not punish the priests, but you punish the neophyte who follows them.

Mr. MOON. Mr. Lehmann, the things followed are expressed approximately like this: I do not think anybody that has ever practiced law or that studied law from any scholastic standpoint is not entirely in accord with my own doctrine, and do not believe the old common-law doctrines are absolutely ridiculous in this: The Supreme Court gives expression to the Constitution of the United States and the courts recognize and establish the distinction between law and equity. The remedies in courts of the United States are in common law and equity in accordance with the Constitution of the United States and in accordance with the principles of common law and equity as distinguished and defined in your act.

Mr. LEHMANN. That, however, is predicated upon your Constitution and your statutes?

Mr. MOON. State statutes, of course.

Mr. LEHMANN. You must preserve, in whatever form you adopt, the substantial distinction between law and equity. That requires, of course, that if there is a common-law right simply involved and the parties insist upon it you must accord them the trial by jury. You can have the trial by jury in a case even though you do not label it "at law," and there is not anything in the Constitution of the United States, and there is not anything in any decision construing the Constitution, as distinguished from the statute which preserves anything whatsoever in the way of form of procedure. Your constitutional limitations relate to the substance. You have, of course, the amendment preserving the right of trial by jury.

Mr. MOON. I think that these cases generally arise where that right is denied by the blending of the true form.

Mr. LEHMANN. Where the right is denied, but not in Iowa, Missouri, and Nebraska, and other States. I had a case early in my practice in Nebraska in which there seemed to be involved the examination of a long account, and it was necessary that that should be referred to a master under the equity procedure, but I took the view that it was simply a matter of common-law right, and made an investigation with respect to that, and I find no distinction between the rulings in the Federal courts and in the State courts. You must allow the trial by jury and you must give to the verdict of the jury where a right of trial by jury exists as a matter of right the effect of a common-law verdict and not simply of a verdict in chancery, which the chancellor can set aside, no matter upon what ground he does it—but you must do that. You can have a dozen issues in one case; six of them may be legal and six of them may be equitable, and you can try the legal issues in a legal way and the equitable in an equitable way, and when you have done that you have respected the substance of the Constitution; and it is not necessary and the Constitution does not preserve the forms; and in these Western States you must bear in mind that they also have that provision securing the right of trial by jury, some of them in one form and some in another—some that the right of trial by jury shall remain inviolate, some that the right of trial by jury shall not be taken away. That is entirely consistent with this blending of legal and equity administration in the same forum, by the same judge, and in the same action. We have it in Missouri; we have it right along there. We will try one part of the case at law and the other part at equity, and it works perfectly.

Mr. MOON. In New York, where this great movement began in 1908, they had to change the constitution of their State.

Mr. LEHMANN. In New York, where this great movement began, the courts deliberately began to nullify the work of David Dudley Field, and the construction that is displayed there is one that is not very much to be commended. They harp on that rule of construction, which is not a true rule, that any statute in derogation of the common law is to be strictly construed, and makes a fetich of the common law, makes a fetich of the very thing that it is the business of legislation to correct, and so they virtually nullify the code of David Dudley Field. And I would not be, with all due respect to Mr. Littleton, very much influenced by the decisions upon the code

in the State of New York, because they did not respect, as they ought to have done in the legislative action, the legislative intent.

Mr. MOON. I think one of the most serious reflections against the code pleadings is the voluminous decisions in the State of New York equity.

Mr. LITTLETON. I have had so many occasions to dissent from the court's holding that I can not feel any offense.

Mr. LEHMANN. Undoubtedly Mr. Moon is right about that, but the courts must get away from that idea that this is in derogation of the common law and therefore it is to be strictly worded. There is only one rule of construction of statute, and that is the intent.

Mr. MOON. I am prepared to say it is a consummation devoutly to be wished if it can be brought about.

Mr. LEHMANN. It can be brought about in part by legislative action and in part by judicial education, and the last is quite as requisite as the first.

Mr. NYE. Namely by the bar, I suppose.

Mr. LEHMANN. The bar needs it, but, as Mr. Wheeler has pointed out, there is a difficulty presented to the lawyer. He has perhaps no right to prescribe for his client what the law is or what the measure of justice is to which the client shall be entitled. The client may say "Courts are constituted for that purpose. You have no right to set up your standard of ethics of justice to determine my rights."

Mr. NYE. But the bar has the right to subscribe a simple, direct method of reaching justice for him, instead of making justice a millstone to hang around the neck of people.

Mr. LEHMANN. And that is what I am trying to do.

Mr. NYE. I understand it, and I am for this bill or any other bill that will simplify legal proceedings and give litigants a right to come to a court without the most learned and profound musty lawyer in the world.

Mr. LEHMANN. Let me tell you where all these bills are weak—all of them. They are simply scratching the surface, and they are commendable simply because they are a step in the right direction. Our formal law is crystallized too much, and too rigid—cast in a legislative form when it all ought to be a matter of rule of the court; that is the fundamental reform.

Mr. MOON. I know that has been recommended, but would you recommend that we should omit all matters of procedure to rules of the court?

Mr. LEHMANN. I should recommend that, except that you place a very few fundamental ones. I would see the day when it could be said of the American court, as it can be said of the English court and was said by Rogers, that they had so far proceeded in the reform of the legal procedure that it could be truthfully stated that no litigant of ordinary sagacity would fail in his case by reason of any mistaken steps in his procedure, and it can be done here.

Mr. MOON. England has pretty nearly done it—almost gone to that point?

Mr. LEHMANN. Yes, sir.

Mr. MOON. I want to say to you that after mature deliberation, so far as I am concerned, I am perfectly willing to trust the courts,

but the general spirit of unrest and distrust that exists in this country to-day, I think it will make it impossible to get there.

Mr. LEHMANN. It may make it difficult to do now, but that distrust and that unrest has come from the complexity of our procedure, and we have made a lucrative mystery of our business.

Mr. DODDS. That is what I was going to say. If it was not for that we would not have that unrest and disrespect.

Mr. MOON. I think that if you will look at our Federal procedure you will find it is an absolute patchwork all the way through.

Mr. LEHMANN. Certainly. The procedure in most of our States is the same thing. The procedure has been made by lawyers for lawyers. We have a statute in Missouri whereby in the trial of a criminal case Judge Rucker may be sitting trying some man. I ask various instructions, which are made, and he gets over those difficulties by references as he thinks proper; and then, in addition to that, I say, "Now, Judge, I want you to instruct on all of the law of the case." "What part of the law have I omitted?" "That is your business, sir, not mine. I now request you to instruct on all of the law of the case." He does not know what else to instruct. The case goes to the jury. The man is convicted, and I have got from then until I argue the case to find out something that neither he nor I thought about on which to reverse the case.

Mr. MOON. Did not they reverse the case there of homicide, first degree, because the prosecuting attorney did not charge the indictment that it was "against the peace and dignity of the Commonwealth," omitting the word "dignity"?

Mr. LEHMANN. It is done in the case of rape, bribery, and in one other.

Mr. LITTLETON. On the other side, is it not a fact that while the English courts have gone a great distance toward eliminating complications of pleadings, that much of our limitations in some sections and much of the complication and much of this delay and much of the thing about which one of these bills is a remedy, grows out of the fact that the judge below treats the trial as an incident and the verdict as the object, and puts you through whip and lash until you have to ambush and sharpshoot in order to save anything in the trial?

Mr. LEHMANN. We deal with verdicts in a very peculiar way, if that is what you refer to. We respect them very much in some ways and we disregard them in others. You have a complex procedure and you give opportunity to the man who is skilled in your procedure and he plays the game, not for the justice of the case, but tries a case for "error;" that is a phrase current in the profession—"try it for error"—that is, try it over the heads of the jury altogether; try it for the court of appeals.

There is too much opportunity—there is too much room for that sort of thing—and it discredits the profession, Mr. Littleton. I have been practicing for 40 years, and I am too old to go into anything else, and I must say that I am ashamed to acknowledge that in the manner of procedure in the 40 years I have been a lawyer there has not been any advance.

Mr. MOON. Speaking about playing according to the rules reminds me of an absolute fact. A friend of mine was appointed to the judiciary in Pennsylvania, and he was a very conscientious fel-

low. He had never tried a case, and he felt as though the weight of the universe was resting upon him. The old president judge noticed that he was perturbed, and said, "You do not need to bother yourself about it at all. The case comes before the court, and if a fellow does not play it according to the rules he loses, and if he does play it according to the rules he has got a chance. That is all you are concerned about—to see that he plays it according to the rules."

Mr. LEHMANN. The trouble is that the client is not skilled in the rules, and if the game is not played "according to the rules" the penalty is paid by the man. The thing was put well by a Kansas lawyer at a meeting of our Missouri Bar Association. He said: "We have two men, neighbors, who have a controversy. It may be over the right to a piece of land. That is the controversy; that is the quarrel between the two.

"They can not adjust it, and so they come to the courts to have that quarrel adjusted and that controversy settled. Each one gets a lawyer and the suit is brought. The moment the suit is brought another controversy arises, not as to who owned that piece of land, but as to whether the suit is properly brought—a quarrel not between the parties, but a quarrel between the lawyers—and the suit may go to the end and be disposed simply on the controversy between the lawyers, and the controversy between the parties may never be touched."

Mr. THOMAS. Does the code provide what suits shall be brought at law and in equity?

Mr. LEHMANN. No, sir.

Mr. THOMAS. Why should not it? Should not that settle the matter?

Mr. LEHMANN. No.

Mr. THOMAS. Why not?

Mr. LEHMANN. Because you could only make a very general rule and under your constitutional limitation that thing which is essentially equitable can not, without amendment to the Constitution, be made legal and that which is essentially legal can not be made equitable. The only way in which there has been a change of equitable jurisdiction growing out of this fact—the one principle of equitable jurisdiction—that its jurisdiction shall not attach where there is an adequate remedy at law and by the extension of legal procedure, as, for example, the right to consult the opposite party and to examine as upon cross-examination.

Mr. MOON. Essentially original and absolutely equitable.

Mr. LEHMANN. That was absolutely equitable and was accomplished through a bill of discovery. I doubt whether in any State of the Union you could found equitable jurisdiction simply upon the thing discovered, because the answer woud be, "You have an adequate remedy at law by your right to examine the party." In that way we have limited equity jurisdiction, but I assume, under constitutional provisions which intrench both law and equity as distinctive jurisprudence, you could not take away the jurisdiction over torts and various other things.

Mr. MOON. Fraud?

Mr. LEHMANN. Fraud and those things which are the fundamentals of equity jurisprudence.

Mr. THOMAS. Could not the equity of those actions be defined within the limits of the Constitution? We do it in our State. They are defined by code in Kentucky. The code states what action shall be brought in law and what action shall be brought in equity.

In Kentucky actions of which courts of chancery had jurisdiction before the 1st day of August, 1851, may be equitable, and actions of which such jurisdiction was exclusive must be equitable, and all other actions must be at common law, or ordinary, as they are termed in Kentucky. Equitable actions are such as actions on return of "no property" and for "discovery," by surety against principal before debt matures and after maturity of debt, for sale of real property of infants and persons of unsound mind, and joint owners, to settle trust estates and estates of deceased persons, to grant divorce and alimony, to grant injunctions, to partition land and allot dower, and to enforce liens on real and personal property, and a number of other things which I do not now recall. I would have to refer to the law in force prior to 1851 to set out fully equitable jurisdiction in Kentucky, and I do not have that law at hand.

Mr. LEHMANN. How does it define that?

Mr. THOMAS. Certain actions at law and certain actions in equity.

Mr. LEHMANN. Does it say actions for the recovery of money only or does it actually classify assumpsit and trover?

Mr. THOMAS. Certain actions shall be brought at law and all other actions shall be brought in equity—shall conform to the Constitution in that respect. Why could not that be done, and then an attorney who brought an action at law that ought to have been brought in equity could simply have his case transferred by an order of the court to equity?

Mr. LEHMANN. You have, your honor, a part of that in the bill here, for a transfer from one docket to another.

Mr. THOMAS. The court making the order transferring all the pleadings, and if any other pleadings were needed let those be filed by leave of the court.

The CHAIRMAN. Our time is growing pretty short.

Mr. MOON. I think we ought to hear this at length.

The CHAIRMAN. We can come back after lunch and hear other gentlemen.

Mr. MOON. I would like to hear Mr. Lehmann through.

The CHAIRMAN. Would you pardon me to finish the statement? The committee has been very indulgent.

Mr. LEHMANN. I will have to ask to be excused. I must go to court at 12 o'clock.

Mr. MOON. I was going to say that I desired to ask Mr. Lehmann a question in regard to the three particular bills that the American Bar Association, through Mr. Wheeler, has presented to the committee. H. R. 16459, that bill I do not believe you have touched on so far in your remarks. [After a pause.] I see; I have it. That is the one that refers to the Ives case.

The CHAIRMAN. Yes.

Mr. LEHMANN. I am not prepared to express an opinion about that. I quite agree with Mr. Moon that we had better look into the foundations of that. I can see one reason why there has been a

difference there: That the appeal allowed on the one side and not on the other. If I am claiming that a statute of the State is in violation of the Federal Constitution and that statute is upheld, then, if my contention is right, I have been denied a right guaranteed to me by the Federal Constitution, and naturally I should have an appeal to the Federal tribunal to secure the enforcement of his right given by Federal authority.

If, however, in the case of the plaintiff who asserts the right under a State statute which is contended is unconstitutional as violating the Federal law, and the State court so holds, the plaintiff has not been denied a right given by the Federal Constitution, but has been denied a right only given by the State law. I see that distinction. I am not prepared to say that that is a sufficient reason for not allowing the appeal, because I can see this state of affairs: You take that kind of law that is involved in that. Suppose that the Missouri, Iowa, and Nebraska Legislatures enacted such laws and the State courts held the laws to be valid and then they were taken to the Supreme Court of the United States and the Supreme Court of the United States said that they were valid and did not violate the Federal Constitution. Then, the case arose in New York and the New York Court of Appeals would hold that the statute was invalid and as violating the Federal Constitution, right in the teeth of construction of the Constitution by the Supreme Court of the United States. It certainly would seem there ought to be some remedy for that state of affairs, but I should like to look into the matter—the matter was suggested to me for the first time less than an hour ago.

The CHAIRMAN. In that connection, as a result of your investigation, would you please give the committee the benefit of it?

Mr. LEHMANN. Yes, sir.

The CHAIRMAN. You can reduce it to writing and address it to the chairman of the committee.

Mr. LEHMANN. Yes, sir; I would be very glad to do that.

The CHAIRMAN. Then, in regard to bill H. R. 16459, recurring to that?

Mr. LEHMANN. Yes, sir.

The CHAIRMAN. Some time ago you addressed to the chairman of the committee a letter approving H. R. 12365. You have not a copy of it there, have you?

Mr. LEHMANN. Yes, sir; I have it.

The CHAIRMAN. You observe the first section of that bill is in the following language [reading]:

> That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law.

I desire to say in that connection that that bill was drawn by me last summer in the light and as a result of a year or more correspondence with two circuit judges, calling attention to the necessity for such legislation, and it seems somewhat in line with one of these bills on the same subject that the American Bar Association

has had me to introduce, and which has been referred to this morning. The bill which has been under discussion which I introduced at the instance of the American Bar Association has opposition. Former Senator Faulkner and others here are in opposition to that particular bill, but none of them have expressed any opposition, so far as I know, to this particular bill H. R. 12365, and what I wanted to know from you was if you still adhere to your opinion that that bill was a good bill and should pass, in your opinion?

Mr. LEHMANN. Oh, yes, sir; I do not change that at all. I have not compared the two bills with each other. I was brought over here rather hastily, and I see now two bills that were laid in some measure to the same subject. I am in favor of either of them.

The CHAIRMAN. I called attention to it so that it may go into the record that this bill H. R. 12365, which was introduced on July 8, 1911, and I reintroduced it on January 18, being now H. R. 18236, and made only the changes as you will observe in the second section of the bill, by striking out the word "circuit" before "courts" and inserting "districts to conform with the duties." That is the only change made.

Mr. LEHMANN. Oh, yes; I must go to the court at 12 o'clock, Mr. Chairman, if we can be excused now.

STATEMENT OF HON. CHAS. J. FAULKNER, OF WASHINGTON, D. C.

Mr. FAULKNER. I desire to correct to some extent the remarks of the chairman, and also to state the reason of my presence here. I am instructed by my client, who formerly requested me to oppose this measure found in bill 16460, to state that they did not desire me to appear for the purpose of making opposition to it. But I appear solely for this purpose and this alone: To file with the committee, with their permission, the protest and very short brief of Joseph I. Doran, of the Norfolk & Western, and Theodore W. Reath, general solicitor of the Norfolk & Western, against the bill known as 16460, and partially, if not entirely, indorsing bill 12365, which was offered by the chairman to Congress last summer.

The CHAIRMAN. And reintroduced at this session with the change striking out "circuit court" and inserting "district court," being now H. R. 18236.

Mr. FAULKNER. Mr. Doran and Mr. Reath are very anxious that their protest shall go into these hearings. In their protest they give very strong reasons for the opposition they have taken, and they analyze to some extent the report of the bar association which has been referred to here by Mr. Wheeler. With the permission of the committee, therefore, I will ask leave to file that, that it may be placed in the record as a part of the same.

Mr. WHEELER. May I ask the chairman if Mr. Faulkner will oblige us with a copy of this brief?

Mr. FAULKNER. I can, Mr. Chairman.

The CHAIRMAN. The brief will be printed as a part of the hearings, and the committee will be very glad to have you file a brief if you like.

Mr. WHEELER. We should appreciate that and we shall be very glad to do that.

The brief of Joseph I. Doran and Theodore W. Reath, submitted in their behalf by Mr. Faulkner, is as follows:

BRIEF OF JOSEPH I. DORAN AND THEODORE W. REATH.

IN THE MATTER OF ALLOWING AND REGULATING AMENDMENTS IN JUDICIAL PROCEEDINGS IN THE COURTS OF THE UNITED STATES.

The bill H. R. 12365 is in two sections. The first section regulates the law and equity practice, and is as follows:

"That in any suit in equity instituted in the courts of the United States wherein it shall be decided prior to final decree that the complainant has a complete and adequate remedy at law the complainant may, at his election, upon such terms as the court may impose, cause the same to be transferred to the law docket of the court, there to be proceeded with as if originally instituted as a suit at law."

In less drastic form this is somewhat the sole alteration which is proposed to be made by the bill known as S. 4029, which proposes to add to chapter 11 of the judicial code two new sections, as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right at any stage of the cause to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."

This last quoted bill is the one which a special committee of the American Bar Association reported favorably as a bill, "To prevent delay and unnecessary cost of litigation." (See report presented at the meeting at Boston, Mass., Aug. 29, 1911, pp. 14–16, and for the bill, pp. 23–24.) The report of the committee justifies the bill by the argument (p. 15):

"If the pleader by mistake has put the words 'at law' in his pleading when he should have put the words 'in equity' or 'in admiralty,' it should be the duty of the judge to make the amendment on the spot."

Again, speaking of the code system, at page 16, the report says:

"Notwithstanding these alarming judicial statements legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right."

If the bills accomplish no more than to permit transfer from the law to the equity side in such a case as that suggested by the committee's report where there was merely a clerical error in naming the writ, declaration, or other pleading, the bill would be unnecessary, for this could readily be accomplished, as the committee points out at page 17, by a rule of the Supreme Court in equity; and surely Congress ought not to be troubled to pass an act as to a matter which can and should be covered by a rule of court.

But the bills—and particularly S. 4029—run far beyond curing a mere clerical error of description. The proposed section (274 A) provides that in case a court shall find that a suit at law should have been brought in equity or the reverse "the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice."

Proceedings at law or in equity are essentially different in origin, nature, and object. The two New York cases (Leroy *v.* Marshall, 8 How. Pr., 373, and Railroad *v.* Schuyler, 17 N. Y., 592) cited on pages 15 and 16 of the report of the special committee of the American Bar Association are correct. The equitable proceedings were devised to cover those cases wherein for some reason a court of law could not administer justice. Hence there is a difference in the essentials of pleading which must ever be maintained. We do not understand that the advocates of these bills dispute this. Yet they urge that the courts shall be directed to do an impossibility, namely, order an amendment to pleadings at law to convert them into pleadings in equity or the reverse, when, in point of fact, neither is germane to the other. An attempt to abolish distinctions so fundamental between these great fields of jurisprudence by an act so indefinite in its terms and summary in its language can only cause years of confusion in practice. Even to attempt to criticize the bill is to realize the impossibility of foreseeing its effects in practice. It is not unfair to say that one of its effects will be to impose upon the court the duty of amending and curing the careless work of the incompetent pleader.

If the bill S. 4029 should pass what would be the result? Instead of well-understood precedents and forms well known and easy to handle by any competent lawyer we shall momentarily have a complete breakdown of the distinctions and slowly the formation, at the expense of litigation to acquire precedents, of an entirely new system based, however, upon the same general principles, because those principles are changeless and have been evolved out of experience.

After all such legislation is at best contrived to protect the few careless or incomptent practitioners from the consequences of their fault. Distinctions and forms, valuable in arriving at and effectually administering justice either at law or in equity, are to be sacrificed in order to save the few blunderers. The same argument, pushed to what was once well described by Mr. Justice Holmes as a dryly logical conclusion, would require the repeal of statutes of limitation, because in their operation they foreclose just claims carelessly assorted or neglected. The idea of such legislation seems to be a hasty generalization from the few cases wherein injustice seems to have been done and the sacrifice of matters which are of value to save those few persons from the consequences of their own fault.

As to codes, we venture the assertion that lawyers who have had the opportunity of observing court procedure in code States and in States where the common-law procedure obtains have usually reached the conclusion that the code proceedings, instead of simplifying litigation, have created the necessity for a reconstruction of the very same controlling principles for the reasons already stated—that they are changeless and inhere in the subject. In Pennsylvania the practice act of 1887 was intended to simplify pleading and practice, but, as one of the great judges of Pennsylvania afterwards said, did no more than substitute for the orderly narration or declaration the telling of the story as one old apple woman would tell it to another. And, at last, the courts in Pennsylvania had to come back to the common-law principles.

Thus, in Emmens *v.* Gebhart (7 Pa. County Court Rep., 522) (1890), Schuyler, P. J., said at page 525:

"Only the forms of special pleading have been abolished; its substance remains and must ever remain."

And in Fritz *v.* Hathaway (135 Pa., 274) (1890), Mitchell, J., said at page 280:

"The act is unwise and is founded on the erroneous and superficial view that, by abolishing technical forms it can get rid of distinctions inherent in the nature of the subject, but it would be doing injustice to the purpose of its framers to hold that it was meant to sanction mere looseness of pleading. Accuracy and technical precision have no terrors except for the careless and the incompetent, and the act of 1887 was not intended to do away with them. As to all matters of substance—completeness, accuracy, and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms."

To some lawyers and to most laymen it appears as though the distinctions between law and equity, and many other actions of apparently formal pleading, are mere technicalities. But nearly all of the so-called technicalities of which laymen complain and many of those of which some lawyers complain are really essentials in the orderly and right administration of justice. The decision of the supreme judicial court of Massachusetts in the case which changed William Cullen Bryant from an indifferent lawyer into a fair poet is of interest in this

connection, though the case did cause Bryant to leave the bar and take up a literary career. That case is Bloss *v.* Tobey (2 Pick., 320) (1824), and was an action of slander. The declaration in the first count charged that the defendant did falsely and maliciously say of the plaintiff, "There is no doubt in my mind that he (plaintiff) burnt it (his store) himself." And in the second count the same phrase, coupled with the further phrase, "he (plaintiff) would not have got his goods insured if he had not meant to burn it" (the store).

For lack of a colloquium showing that an illegal act was charged in the alleged slander, and showing the circumstances under which the words were spoken, this pleading was held bad after verdict, and properly so, for if any other rule had been announced the result would have been to allow recovery to that particular plaintiff, but a safeguard of litigation would have been lost, namely, the safeguard that all the essential circumstances of the cause of action shall be shown in the declaration in order to warn the defendant of the cause of action he will be called upon to meet and enable him to prepare his case, summon the necessary and proper witnesses, etc.

The courts of the United States are already empowered to take care of the subject matter of the proposed bills in so far as the orderly and proper administration of justice requires or permits. (See Schurmeier et al. *v.* Connecticut Mutual Life Ins. Co., 171 Fed., 1, and the report of the American Bar Association's special committee at p. 17.) The passage of any bill on the subject is unnecessary and unwise, and some of the bills suggested would be mischievous.

Respectfully submitted.

JOSEPH I. DORAN.
THEODORE W. REATH.

JANUARY, 1912.

Mr. FLOYD. I move we adjourn.

Mr. DODDS. Is that to be printed in the record?

The CHAIRMAN. If that is the desire.

Mr. DODDS. I think if that is to be printed in full we should print it all.

The CHAIRMAN. Ought to be a part of the proceedings of the committee?

Mr. DODDS. Yes.

The CHAIRMAN. It will take that course, without writing it out; let this go in the proceedings—the two of them.

The report of the special committee of the American Bar Association and the brief of the American Bar Association submitted by Mr. Wheeler are as follows:

REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION.

[To be presented at the meeting of the American Bar Association, at Boston, Mass., August, 1911.]

To the American Bar Association:

The special committee appointed at the meeting of this association in 1907, and continued at each annual meeting since then, was charged with the duty of considering carefully alleged evils in judicial administration and remedial procedure, and suggesting remedies and formulating proposed laws.

We were authorized at the last meeting to present to Congress at its next session the bills heretofore reported by the committee and recommended by this association, in such form as to obviate as far as possible the objections thereto that have been taken in Congress, but retaining the essential principle of the bills heretofore recommended by the association. These bills were specifically recommended by the President in his annual message, December, 1910 (p. 44).

The association at that meeting approved the recommendation of our committee respecting the practice in admiralty, and we were instructed to bring the subject to the attention of the Supreme Court of the United States and to request that honorable court to adopt a rule in admiralty which should direct that the testimony in admiralty cases be taken in open court, subject to the provisions of the statute in regard to depositions de bene esse.

We were also authorized to consider a general practice act and to report thereon at this meeting. In this connection two resolutions were referred to us for consideration. The first of these was presented by Mr. Thomas Wall Shelton, and is as follows:

"*Resolved*, That in whatever form of pleading that may be adopted, there shall be preserved the common-law limitation upon the court that whatever is not juridically presented can not be judicially determined."

The other resolution was offered by Mr. Ernest T. Florance:

"*Resolved*, That the committee to suggest remedies and formulate laws, etc., be instructed to consider the preparation of a bill providing for the abolition of difference of forms of procedure between actions at law and cases in equity in the Federal courts."

1. In accordance with the instructions of the association we presented to Congress at its last session, beginning in December, 1910, the bills which had been recommended and approved by this association, which are to be found in full on pages 7 to 10 of our last report (pp. 620 to 623, vol. 35, for 1910). The bills were referred in each House to the Committee on Judiciary. We had a hearing before the full committee of the House of Representatives and before the subcommittee of the Senate consisting of Senators Nelson, Dillingham, and Overman. We also had many interviews and much correspondence with individual members of both committees. The question whether the amendments to procedure proposed in the first two sections of the bill would interfere with the province of the jury was debated very fully at the public hearing and in discussions with individual members. We endeavored to convince the committees to whom the matter was referred, that so far from impairing the value of a trial by jury the amendments proposed tended to increase its value and to promote the determination of causes upon the merits rather than upon technical objections which do not affect the merits, and to which juries pay no attention. We pointed out that by giving more finality to the verdict of a jury, rendered when the facts of a case are fresh in the memory of witnesses, and permitting the appellate courts to pass directly upon the questions of law involved, without the necessity of ordering a new trial, we would make it possible to terminate every cause upon its real merits, present these merits fairly to the court, and put an end to the litigation as soon as this can be done consistently with giving a full and fair hearing to both parties.[1]

We could not discover that there was any serious objection in either committee to these two sections except that arising from a conservatism which is reluctant to make any change whatever. Nevertheless our efforts failed to obtain a report to the House or the Senate from the full committee of either body. The subcommittee of the Senate reported the bills to the full committee of that body.

There were also objections made to the third, fourth, fifth, and sixth sections of the bill to regulate judicial procedure. These relate to writs of error and appeals in criminal cases and habeas corpus proceedings. Some members of each committee were unwilling to put any limitation whatever upon the right of appeal in criminal cases.

Meanwhile the pending bills had attracted much attention in the House of Representatives. Many Members had become interested in them. It will be remembered that there was pending in the House of Representatives a bill which had been originally prepared by the Commissioners to Revise the Statutes of the United States, and which had been referred to a committee of the House of Representatives known as the Committee on the Revision of the Laws. Of this committee, Hon. Reuben O. Moon, of Pennsylvania, was chairman. He was also a member of the Judiciary Committee. When this measure was first under consideration before a joint committee of both Houses in 1906, a meeting of the lawyers of New York who practice in the Federal courts was held, at which several amendments were agreed upon and suggested to the joint committee. Among the amendments which were suggested at that time there were six which substantially proposed the reforms in procedure which were afterwards recommended by this association and embodied in the bill to regulate the judicial procedure of the United States already referred to.

These amendments in 1906 were drawn so as to correspond to the bill in the form in which it was then before the joint committee. It seemed, however, that there was no likelihood of this bill being seriously taken up by Congress, and in the original report of this committee we thought it expedient to recommend these amendments as separate measures drawn with reference to the Re-

[1] Church *v.* Hubbart (2 Cranch, 232).

vised Statutes as they then existed. But the unexpected happened. The new Committee of the House of Representatives on the Revision of the Laws reported to the House, with some amendments, the bill which had been drafted by the commissioners, and succeeded in getting their report upon the calendar in such a form that it had the right of way, and did receive during several successive weeks, on the days set apart for the reports of committees, very full consideration. In view of this fact your committee conferred with several members of the Committee on Revision of the Laws, and especially its chairman, Mr. Moon. It was agreed that when section 254 of the judiciary act came up for consideration, the first two sections of the association's bills, combined into one section, should be moved as an amendment to the reported bill.

Meanwhile Mr. Madison, of Kansas, had become so much impressed by the arguments presented in support of the association bill, that after conference with your committee he introduced in the House as a separate bill, a section embodying the first two sections of the association bill in the form in which they had been agreed to before the Judiciary Committee. After considerable discussion this bill passed the House unanimously. It went to the Senate, was referred to the Judiciary Committee, but all the efforts of your committee were unavailing to procure a report upon it. The expressions of opinion from individual Members of the Senate were so favorable that we had reason to believe that if the bill could have been got out of committee it would have passed the Senate. The other method which had been planned to bring the bill before the Senate failed, because of the fact that there was so much debate in the House upon the early sections of the Judicial Code (as it is designated in section 296), which relate to judicial districts and to the jurisdiction of the district courts, that section 254 was not reached for consideration. The code, with numerous amendments which were made in the House, was finally passed under a suspension of the rules. The Senate meanwhile had passed the code in a different form. They both went to a conference committee and the Judicial Code finally passed in the form with which the association has already become familiar.

We may say that as this code was drawn by the Commissioners on the Revision of the Statutes it effected very little change in the practice of the Federal courts, with one single important exception. It did consolidate the courts of original jurisdiction into one court, to be known as the district court of the United States in each judicial district, and it did abolish the circuit courts. Ths is in accord with the recommendations of our report of 1910. As drawn by the commissioners it failed entirely to provide for the numerous instances in which it is desirable to have an order made by one judge operative in the whole circuit. For example, in railroad foreclosures it is of great importance that a receivership should extend throughout the entire circuit in which the railroad runs. This defect was, however, corrected in the House, the amendment was adopted in conference, and is included in the bill as finally passed and signed by the President.

We append hereto (schedule A) a copy of the bill recommended by your committee, which passed the House, and we recommend that the committee be authorized to present this bill at the next session of Congress in the form in which it passed the House as an amendment to section 269 of the Judicial Code, and urge its adoption upon both Houses of Congress.

2. The sixth section of the bill recommended by this association is incorporated in the judicial code. Section 128 of this code gives to the circuit courts of appeal jurisdiction to review by writ of error the judgments of the district courts in all criminal cases, including capital cases, and makes their judgment final, except in cases involving constitutional questions.

We also recommend that the remaining sections of the bill to regulate the judicial procedure of the courts of the United States, recommended by this association in 1910, be embodied in a separate bill and recommended for adoption by Congress.

3. It will be of interest to the association to put on record some results of the agitation for a change in the method of dealing with error alleged to have been committed by trial courts. In courts of justice in this country, quite apart from any legislation, the change is very manifest.

For example, in Vicksburg & Meridian Railroad Co. *v.* O'Brien (119 U. S., 99, 103; 30 Law. Ed., 299, 300), decided November 1, 1886, Mr. Justice Harlan said:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt,

that the error complained of did not and could not have prejudiced the rights of the party."

Waite, C. J., and Field, Miller, and Blatchford, JJ., dissented.

The dissent on the part of these four eminent judges has received the approval of the court in subsequent cases. For example, in Standard Oil Co. *v.* Brown (218 U. S., 84, 86; 54 Law. Ed., 945, 946), decided May 31, 1910, the court said:

"The rule is familiar and elementary that the pleadings and proof must correspond, but a rigid exactitude is not required."

The court held that errors in the charge or refusal to charge would not be considered as reversible error when it was plain that the issues had been fairly presented to the jury.

The reason for the change is well stated by the Court of Appeals of the State of New York in People *v.* Gilbert (199 N. Y., 28), decided in 1910:

"The objection is purely technical, and technical objections are no longer regarded as serious unless they are so thoroughly supported by authority that they can not well be disregarded, even under the latitude of the statute relating to the subject. The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was so severe as in many cases to shock the moral sense of lawyers, judges, and the public generally. When stealing a handkerchief, worth 1 shilling, was punished by death, and there were nearly 200 capital offenses, it was to the credit of humanity that technicalities should be invoked in order to prevent the cruelty of a strict and literal enforcement of the law. Those times have passed, for the criminal law is no longer harsh or inhumane, and it is fortunate for the safety of life and property that technicalities, to a great extent, have lost their hold. We overrule the contention of the defendant in regard to the indictment, because it is founded on a technicality, with no support in authority and with but slight support in reason."

Judge Coxe, delivering the opinion of the circuit court of appeals in Press Publishing Co. *v.* Monteith (180 Fed., 357), thus states the change that some courts have already made in dealing with the subject of "reversible error."

"The defendant realizing, apparently, that even upon its own presentation no very serious error has been committed, invokes the archaic rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.

"Prejudice must be perceived, not presumed or imagined.

"The writer, speaking only for himself, is in hearty accord with the modern tendency.

"The object of all litigation should be to arrive at a just result by the most direct, speedy, and inexpensive proceedings. If such a result can be reached by absolutely inerrant methods, so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long-continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility.

"One of the English rules provides:

"'A new trial shall not be granted on the ground of the misdirection of the jury or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.'

"Were such a rule in force here, even assuming that defendant's contentions are correct, the court would be unable to say that substantial wrong has been done the defendant. In several instances the alleged error was subsequently corrected and the excluded evidence supplied.

"The granting of a new trial is often a denial of justice, witnesses die or remove beyond the jurisdiction of the court, and the resources of the litigants become exhausted.

"Believing as we do that the libel here was without justification or excuse and that the verdict was not excessive, we should hesitate long before requiring the plaintiff to begin anew the weary pilgrimage through the courts."

Legislation which embodied substantially the rule of decision recommended by this association has been adopted by the Legislatures of Kansas, Illinois, and Wisconsin, and has been under consideration in the Legislatures of Ohio and New York. We hope that during the present year it will appear that these changes have become part of the legislation of the latter State. It has been recommended by the State bar association and by the bar association of the city of New York, which is believed to be the oldest, and is certainly one of the most conservative, bar associations in America.[1]

4. While the association had under consideration the bill to diminish the expenses on proceedings of appeal and writs of error, the bar association of the State of Washington had prepared a different bill intended and adopted to accomplish the same purpose as our own. In justice to ourselves we feel bound to say that we think that the form recommended by this committee and adopted by the association was more in harmony with existing legislation than the bill drawn in Washington. It is, however, unnecessary to call the attention of the association more particularly to the difference, in view of the fact that the bill, as drawn by the association in Washington, received the approval of Congress and was signed by the President. It excited at first much unfavorable comment on the part of clerks of the circuit courts of appeals, and it was thought at first that the bill as drawn might make it impossible to meet those expenses of the court which were provided for by the fees of the clerk. We are informed that on more careful consideration this objection seems not to be well taken. Your committee is distinctly of opinion that this country ought not to expect that the expenses of the administration of justice should be paid out of the fees exacted from suitors. The country can well afford to maintain its courts and provide from the Public Treasury for all suitable expenses of the administration of the law.

5. The third bill recommended by the association authorized the appointment of stenographers in the courts of the United States and fixed their duties and compensation.

There is a large and influential stenographers' union. This union had prepared a bill which undertook of itself to fix all compensation without leaving its determination to the judges in the different circuits. Neither of the proposed schemes received the approval of Congress.

6. The next subject which was referred to us was that of limiting the right of appeal from the courts of the District of Columbia to the Supreme Court of the United States. On this subject we have had full consultation with members of the bar of the District of Columbia. We have come to the conclusion that the right of appeal as it now exists, as amended by section 250 of the Judicial Code, is not productive of so much inconvenience or delay to other suitors from the States of the Union whose cases come before the Supreme Court as has been supposed, and your committee does not at this time recommend any change in the section of that code relating to such appeals.

7. We have prepared the following addition to the forty-fourth rule of the Supreme Court in admiralty, which we recommend for approval by this association:

"That in all cases of admiralty and maritime jurisdiction either party may introduce oral testimony and have examination of witnesses in open court."

The reasons for this amendment are so fully stated in our previous report that we think it unnecessary to repeat them here. If approved, we will submit it to the Supreme Court under the authority heretofore conferred upon us.

8. The same evils that have been felt to exist in admiralty cases in some of the circuits have also been felt in equity cases, caused by the fact that under the existing equity rules testimony in all cases is taken out of court. The complaints on this subject have been so numerous that the Supreme Court itself has appointed a committee, consisting of Chief Justice White, Mr. Justice Lurton, and Mr. Justice Van Devanter, "with directions to consider and report such changes as the committee may conclude would, if adopted, tend to the simplification of pleading and practice and the correction of any unnecessary delay or unreasonable cost resulting from practice under the rules as they now exist." Mr. William J. Hughes has been appointed secretary of this committee, and he has requested your committee to aid the court in the performance of the task which it has undertaken.

Your committee is of opinion that the same reasons which led the association to recommend the adoption of the admiralty amendment are equally ap-

[1] Reference may also be had to the following cases: Savage *v.* Modern Woodmen (84 Kans., 63); Harris *v.* State (80 Nebr., 195, 114 N. W. Rep., 168); Byers *v.* Territory, Okla. (103 Pac., 532); State *v.* Bird, Mont. (111 Pac., 407).

plicable to equity cases. It is a well-known fact that in England and many States of the Union testimony in equity cases on the main issues is taken in open court. This does not interfere with the practice of referring all matters of account to a master in chancery, but it leaves to the judge himself the determination of the fundamental questions in the case.

Among the objections that have been taken to this practice in equity cases is that the judge will say, "I do not care to hear the testimony, because I must read it." It is not for this committee to declare that no judge will ever make this statement, but we can affirm as a result of our own experience that judges in the State courts do not, and Federal judges, when they are hearing cases in admiralty, do not make such an unreasonable observation. We find the actual practice usually to be that when the judge hears the testimony he does not read it in extenso afterwards, but refers to it as his attention is drawn by the briefs of counsel or by his own investigation. It is possible that a judge who had not been in the habit of hearing oral testimony in cases of this sort might at first think that he would be obliged to read the testimony in extenso. But in point of fact one great object of the change is to relieve him from his burden, to give him the testimony in all its freshness and enable him to ask of the witnesses such questions as may tend to elucidate the case upon the merits. Experience shows that frequently these questions by the trial judge are illuminating and assist in a most important manner in the ascertainment of the facts.

We may be permitted to refer to the customary practice of one of the great judges of the United States Supreme Court, Mr. Justice Blatchford. He was the first district judge who was promoted to be a justice of the Supreme Court. His custom was to hear the oral testimony in admiralty cases with the greatest attention, and practically to make up his mind on the facts after the argument of counsel, just as a juryman is required to do when a verdict is asked of him upon the submission of the case. The questions of law arising upon these facts he took for more deliberate consideration. All lawyers who had the privilege of practicing before him know how admirably this method of dealing with litigated questions conduced to the ends of justice, and how satisfactory it was to the bar.

In New Jersey, which is one of the States where a separate court of chancery still exists, the practice of hearing the testimony viva voce in open court has proved satisfactory both to the bench and to the bar. We are distinctly of opinion that a change in this respect would be beneficial in the Federal courts. There is a reason for its adoption there that does not exist in those jurisdictions where there is a separate court of chancery. A Federal judge sits at law, in equity, and in admiralty. He has experience in hearing oral testimony in the trial of cases at law. In those circuits where the admiralty evidence is taken viva voce he also has that experience. The practice has been so successful in these branches of the Federal jurisdiction that your committee think that nothing but the conservatism, to which reference has been made, will prevent the adoption of the reformed practice in all equity cases. It may, perhaps, require the appointment of additional judges. If experience should prove this to be the case, we have the satisfaction of knowing that the country is well able to defray the expense which this would entail. Indeed, the entire annual cost of the judicial administration of the United States is less than that of one of the great battleships which we find it so easy to construct.

The objection is also taken that it would be difficult and expensive to procure the attendance of experts before the judge. We are of opinion that experience would show in equity, as it does now in admiralty cases, that the attendance of witnesses would be arranged for mutual convenience, that some depositions woud be taken out of court, but that the most important witnesses would be examined in open court and that the judge would derive from their oral examination a much clearer understanding of the real judgment of the expert. We know that expert testimony sometimes obscures when it should elucidate. The judge would shorten the examination and arrive at the truth more certainly than he now can do.

Another committee of this association has had this subject under consideration. One of its members, Mr. Frederick P. Fish, has formulated the method, stated in schedule B, annexed to this report. Some members of this committee approve the proposition, but we have not been able to consider it in full committee. We submit it for the consideration of the association.

In this connection we call attention to the resolution of Mr. Florance. It was said in the debate at Chattanooga by one of the members, "Under the

Constitution of the United States the equity practice exists." It seems to your committee that this is a misapprehension.

What the Constitution does say is this (art. 3, sec. 2, subdivision 1):

"The judicial power shall extend to all cases of law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

This section of the Constitution, in our opinion, recognizes the fact that there is an intrinsic difference between the substantive rules and the remedies which prevail at law and those which prevail in equity. It has never, so far as we are aware, been proposed to abolish or destroy this fact. It certainly has not been destroyed in any of the code States. But the Constitution says nothing about the procedure of the courts. It says nothing about preserving the jurisdiction of the court of chancery as a separate jurisdiction. In fact, the original judiciary act of 1790 abolished this distinction entirely. There has never been, since the foundation of the Government a separate Federal court of chancery. Every Federal judge, under the existing system, is a chancellor, and also in propria personna a judge at nisi prius, a judge of the admiralty court, and of the bankruptcy court. All that is necessary for the pleader in order to express the distinction is to put at the head of his pleading the words "at law" or "in equity" or "in admiralty."

There is no magic in these particular symbols. No one of them is a shibboleth or a fetish. The court is a unit. There can be on possible reason why the judge who to-day sits in the jury term, to-morrow holds the equity term, and on the third day holds the admiralty term, should not have full power in either division to administer justice upon the merits. If the pleader by mistake has put the words "at law" in his pleading when he should have put the words "in equity" or "in admiralty," it should be the duty of the judge to make the amendment on the spot. It really seems absurd to say that such a mistake must injuriously affect the substantial rights of the adverse party. If the law is a mere game in which the man who is cleverest in the rules of the game will win, then by all means let us retain these tricks of the trade and add to them all those that once existed, but which have inconsiderately been abolished. But if it be, as we believe, the function of a court to do justice between the parties, all requirements which interfere with the administration of justice should be repealed.

The fears expressed that to break down the procedural distinctions in law and equity cases would impair the constitutional grant of judicial power in "cases of law and equity" is a revival of fears entertained in New York and other States at the time of the adoption of the codes. In Leroy *v.* Marshall (8 How., par. 373), Justice Barculo said:

"I am not prepared to deny that the authors of the code may have supposed that law and equity could be administered in precisely the same forms, nor that some sections of the code were designed for that purpose. But every judge knows, and every lawyer should know, that in practice the thing is impossible.

"Legal and equitable proceedings are essentially different from each other in their origin, nature, and object. * * * Indeed, it would be a matter of astonishment—if we were permitted to wonder at anything in this line—that any man of 'common understanding' should have suffered the idea to enter his head that legal and equitable proceedings could be molded in the same form and be measured by the same rules. Every person who has studied and understands the law as a science knows that there is substance in the distinctions between actions, and that those requirements which superficial observers call 'unmeaning forms and prolix statements,' were really wise and indispensable safeguards and protections in administering the most important as well as the most intricate of human sciences."

In New York & New Haven R. R. Co. *v.* Schuyler (17 N. Y., 592), Judge Comstock remarked that the code "with characteristic perspicacity had in fact abrogated equity jurisdiction in many important cases." Notwithstanding these alarming judicial statements, legal and equitable remedies continue to be administered under the codes; legal principles and equitable principles continue to be observed. Many think that they are more conveniently administered and observed under an approximately uniform procedure than they were in those days when a mistake in the choice of a proceeding threw the plaintiff out of court, even if it did not finally defeat his right.

It was for many years the practice in the Federal courts to dismiss a suit which was held to have been brought on the wrong side of the court and compel

the plaintiff to resort to another action. But in the recent case of Schurmeyer *v.* Connecticut Mutual (171 Fed., 1), a more liberal practice was adopted. Plaintiff sought relief in an action at law which could only be granted in a suit in equity. This was finally decided by the circuit court of appeals and the case remanded to the circuit court. Judge Amidon, in the circuit court, made an order directing the plaintiff to transform his complaint at law into a bill in equity, and directed that the cause be transferred to the equity docket, there to be proceeded with the same as if it had been originally brought as a suit in equity. The circuit court of appeals approved this practice (ibid., p. 7). The court followed a very able opinion by Judge Shiras in United States Bank *v.* Lyon County (48 Fed., 632).

Your committee has prepared a bill (Schedule C), which undertakes to provide a remedy for the evil which has been mentioned. In view of the decision just referred to, it may be that the object of the first section of this bill could be accomplished by a rule of the Supreme Court in equity, which would regulate the practice in all the circuits and conform it to that adopted in the cases just cited.

9. So far as the subject of a general practice act is concerned, your committee has been entirely unable, within the time which has elapsed since the last meeting of the association, to formulate an act upon this subject. A subcommittee, however, is drafting a preliminary scheme to which your committee, if continued, will be glad to give further and more deliberate consideration.

10. There is one more subject within the scope of the general resolution creating this committee which we have considered, and which we bring to the attention of the association. In the first judiciary act jurisdiction was given to the Supreme Court to review by writ of error, a judgment of the highest court of the State in which a party had asserted a claim under the Constitution and laws of the United States, and the decision of the State court had been adverse to this claim. In Cohen *v.* Virginia (6 Wheat., 414) the Supreme Court held that this grant of power was authorized by that clause of the Constitution to which reference has been had, that such a writ of error was a case arising under the Constitution and laws of the United States, and that it was competent for the Supreme Court to reverse the judgment of the State court. This jurisdiction has been exercised most beneficially and some of the most important decisions of the Supreme Court have been made under the power thus conferred.[1] It is not too much to say that without the powers which the Supreme Court in these cases (in every one of which the decision of the lower court was reversed) maintained for the Federal Government, we should not have been a Nation and would have gone to pieces. Indeed, a government without the powers thus asserted would not have been worth preserving. The historic reason for the limitation in the original judiciary act, to wit, that the writ of error should only be permitted where the decision in the State court had been adverse to the claimant, was this: It was thought that the main ground for giving the jurisdiction was that there might be a jealousy of the Federal Government on the part of the State courts. In fact this jealousy did exist in the earlier years of the country's history. Therefore where the decision of the State courts was in favor of the right asserted under the Federal Constitution it was thought there would be no just ground for complaint.

In the present generation we are confronted with a new situation. There are many instances in which the language of portions of the Federal Constitution has been adopted by the constitutions of the several States. In litigated cases rights have been asserted under both constitutions. The rights thus asserted are of exemption from the provisions of laws which in the judgment of the great majority of the people of the States are essential to the public welfare. Take, for example, the subject of compensation for injuries to workmen. The evils which exist under the present system of making compensation for injuries caused by negligence are so great that they have excited universal attention. One of the most serious of them has been condemned by this association in its code of ethics; that is to say, the business which has grown up in large centers, commonly known as ambulance chasing. There are practitioners who keep their scouts on the lookout for accidents, seek employment at once from the injured party, engage to pay the expenses of the litigation upon contingent fees, often amounting to 50 per cent of the recovery. All this business we have condemned, and justly condemned.[2] Yet it is almost a necessary consequence of the failure of the State to make any provision for compen-

[1] Dartmouth College *v.* Woodward (4 Wheat., 518); Gibbons *v.* Ogden (9 Wheat., 1); McCullough *v.* Maryland (4 Wheat., 316); The Passenger Tax cases (7 How., 288).

[2] Canons, 27, 28; 33 Reports American Bar Association, 582, 583.

sation to be ascertained in a more reasonable manner, and to be determined in advance. At its last term the Court of Appeals of the State of New York held that a workmen's compensation act, which had been adopted by the legislature of that State after very careful consideration and which the court admitted to be beneficial to the public, was in violation of that clause of the fourteenth amendment which has been embodied in the constitution of the State of New York, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law."[1] There is a similar clause in the constitutions of most of the States. Similar acts on the subject of compensation for injuries have been passed in many of the States. One very like the New York statute has been passed in the State of Washington, and the question of its constitutionality is under advisement by the supreme court of that State. It seems to many counsel, learned in the law, quite probable that the decision in Washington will be the reverse of that in New York. We shall then be in the position of having the Constitution of the United States mean one thing in New York and another in Washington.

The reason which originally prevailed for the adoption of this limitation upon the right of review has ceased. The reason having ceased, the law should cease. No such limitation is contained in section 250 of the Judicial Code relating to the review of decrees of the District of Columbia courts. We therefore recommend that this limitation be repealed, and report a bill, Schedule D, for that purpose.

We also submit a report from the subcommittee dealing with the subject of law and equity in the Federal courts. This is marked "Schedule E."

One member of our committee, Mr. Allen, dissents from that portion of the report relating to Schedule D. We submit a copy of his dissenting memorandum, marked "Schedule F."

We recommend for adoption the following resolutions:

"*Resolved*, That the special committee to suggest remedies and formulate proposed laws be continued with the powers heretofore conferred upon it.

"*Resolved*, That it be discharged from further consideration of the subject of District of Columbia appeals.

"*Resolved*, That the American Bar Association approves the provisions of the bill to amend chapter 11 of the Judicial Code of the United States, reported by said special committee.

"*Resolved*, That the American Bar Association approves the provisions of the bill to extend the right of review in cases arising under the Constitution of the United States, reported by said committee, being an amendment to section 237 of the Judicial Code.

"*Resolved*, That the American Bar Association approves the amendment to admiralty rule No. 44, reported by said committee.

"*Resolved*, That the said committee be instructed to bring the portion of the report relating to equity practice to the attention of the Justices of the Supreme Court of the United States.

"*Resolved*, That the said committee be instructed to take such steps as it shall deem expedient to procure the introduction and passage of said bills at the next session of the Congress of the United States, and to recommend the same to the attention of the committees of Congress to which the said bills may be referred."

All of which is respectfully submitted.

EVERETT P. WHEELER, *Chairman*,
ROSCOE POUND,
CHARLES F. AMIDON,
JOSEPH HENRY BEALE,
FRANK IRVINE,
SAMUEL C. EASTMAN,
HENRY D. ESTABROOK,
CHARLES E. LITTLEFIELD,
EUGENE A. BANCROFT,
STEPHEN H. ALLEN,
ARTHUR STEUART,
JOHN D. LAWSON,
SAMUEL SCOVILLE, JR.,
WILLIAM L. JANUARY, *Secretary*.

BOSTON, *August 29, 1911*.

[1] Ives *v.* South Buffalo R. Co., decided May, 1911.

SCHEDULE A.

[H. R. 31165.]

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, No judgment shall be set aside, or reversed, or new trial granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties. The trial judge may in any case submit to the jury the issues of fact arising upon the pleadings, reserving any question of law arising in the case for subsequent argument and decision, and he and any court to which the case shall thereafter be taken on writ of error shall have the power to direct judgment to be entered either upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

Passed the House unanimously, February 6, 1911.

SCHEDULE B.

I am satisfied that there can be no real reform in equity procedure and practice in the United States courts until there is a judge in control of each case from the time the pleadings are completed, with a definite feeling of responsibility on the part of the judge that he is to control the procedure. Specifically, I believe that the best possible plan would be this:

As soon as the pleadings are completed, the case should be assigned to a judge who will practically control it from that moment. He should immediately bring counsel together and find out what the case is about. He should learn specifically what is the nature of the controversy and definitely what are the defenses. He should then determine which of those defenses could properly and fairly be tried in open court. If he found, on this preliminary hearing, that there was testimony to be taken out of the circuit or that certain testimony could not be produced in open court, he should then and there appoint an examiner to take this particular testimony within a fixed time, which, of course, he could extend if necessary. If any questions arose in the course of this testimony, he should not refuse to pass upon them, but should recognize an obligation to do so.

At this preliminary hearing, having arranged for taking the testimony that must be taken before an examiner, the judge should set the case down for hearing at a fixed date, at which time the rest of the testimony would be taken orally before him. At the trial there would be the depositions taken before the examiner and a stenographic report of the testimony taken from day to day in open court. In all the great centers testimony taken one day could be in print the next morning.

If at any time during the trial there was a surprise or any ground for so doing, the court would adjourn the hearing for a time, that the parties might have the opportunity to meet the new conditions. The trial in open court would be resumed at the expiration of the period of adjournment.

The rule of Blease *v.* Garlington should be amended so that the trial judge could deal with testimony in equity substantially as he deals with testimony at law. The rights of a party offering testimony which the trial judge rejected could be protected by a statement from counsel offering the testimony as to what it was and what he expected to prove. The appellate court could then determine whether the testimony had been properly or improperly excluded, and if its view was that the testimony had been improperly excluded, the case could be sent back for the single purpose of taking this testimony.

It would be an enormous gain in patent cases if the experts should be forced to testify in the presence of the court. I have no doubt that the length of expert depositions would be reduced 75 per cent and the court would be sure to understand the experts. The court would check the expert whenever he got away from the points of the case and would check the cross-examination when the same was improper.

If cases were prepared in this way a very large number of them could be decided by the trial judge before he left the bench at the close of the hearing. His opinion would be taken down stenographically and subsequently revised by him if necessary. He would be spared the necessity of reading an enormous record, with the subject matter of which he was not familiar, for the sake of getting at the comparatively few points upon which every case ultimately is determined.

FREDERICK P. FISH.

SCHEDULE C.

AN ACT To amend chapter eleven of the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter eleven of the Judicial Code entitled "Provisions common to more than one court" shall be amended by adding at the end thereof new sections to be known as sections two hundred and seventy-four A and two hundred and seventy-four B, to read as follows:

"SEC. 274 A. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right at any stage of the cause to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"SEC. 274 B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall reqire."

SCHEDULE D.

AN ACT To amend section two hundred and thirty-seven of the Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of the Judicial Code be, and the same is hereby, amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States [*and the decision is against their validity*]; or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States [*and the decision is in favor of their validity*]; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under the United States [*and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority*], may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

The bracketed words in italics are to be omitted.

SCHEDULE E.

REPORT OF SUBCOMMITTEE UPON THE RESOLUTION OF MR. FLORANCE AND THAT OF MR. SHELTON.

I.

LAW AND EQUITY IN THE FEDERAL COURTS.

The first question in any proposed reform in Federal procedure with respect to the absolute separation of legal and equitable proceedings must be one of constitutionality. There are many dicta in the books to the effect that such a separation is required by provisions of the Constitution. It may be well to set forth these dicta.

"It is undoubtedly true, as contended for in the argument of the complainant in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Constitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States in administering the remedy for an existing right. The rule applied to the remedy and not the right. * * * It is the form of remedy for which the Constitution provides." (Taney, C. J., in Meade *v.* Beale, Taney, 339, 361; 1850.)

This dictum of Chief Justice Taney (at circuit) has been cited as meaning that the Constitution provides for a proceeding in chancery for all rights to which such proceedings were appropriate under the old English practice. But, proprly apprehended, such is not its meaning. The learned Chief Justice saw, what many have pointed out since, that the distinction was one of remedy; that for certain situations our legal system provides a remedy by a command addressed to and enforced against the person, and that the Constitution expressly provides that the Federal courts shall administer this type of remedy in appropriate cases. It does not provide, nor does the dictum above quoted say that it provides any procedure by which the type of remedy in question is to be sought or in which it is to be awarded.

A number of subsequent dicta, however, are put more sweepingly:

"The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law." (Taney, C. J., in Bennett *v.* Butterworth, 11 How., 669, 674; 1850.)

Here, again, what is meant is that one whose claim is legal must have a legal remedy; not that this remedy must be sought in any particular form of proceeding. The former was all that the court had to decide.

"In the last-mentioned case (Bennett *v.* Butterworth, supra) the Chief Justice, in delivering the opinion of the court, says: 'The Constitution of the United States has recognized the distinction between law and equity, and it *must* be observed in the Federal courts.' In Louisiana, where the civil law prevails, we have necessarily to adopt the forms of action inseparable from the system. But in those States where the courts of the United States administer the common law, they *can not* adopt these novel inventions, which propose to amalgamate law and equity by enacting a hybrid system of pleadings unsuited to the administration of either." [Italics in the original.] (Grier, J., in McFaul *v.* Ramsey, 20 How., 523, 525; 1857.)

This protest against the attempt of the Federal district court for Iowa to apply the Iowa code of civil procedure was well taken. Beyond that, the passage is only one of many oracular pronouncements to be found in the books, when the codes of procedure were new, which have been refuted by the event.

"The only way in which the defendant could have effectively raised the question of his liability as a shareholder, arising from frauds committed by the bank or its officers before its suspension, whereby he was induced to become a shareholder, was by a suit in equity against the bank and the receiver. Instead of pursuing that course, he sought by interposing an equitable defense to defeat this action at law brought by the receiver under the statute. That can not be done, because under the Constitution of the United States the distinction between law and equity is recognized, so that in actions at law in a circuit court of the United States equitable defenses are not permitted." (Harlan, J., in Lantry *v.* Wallace, 182 U. S., 536, 550; 1900.)

"There is a fundamental distinction growing out of the Federal Constitution and legislation between legal and equitable procedure. The seventh amend-

ment to the Constitution provides that in 'suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.' And section 16 of the judiciary act of September 24, 1789, reproduced in section 723 of the Revised Statutes, enacts that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' These constitutional and statutory provisions control the procedure of the Federal courts." (Bradford, J., in Jones *v.* Mutual Fidelity Co., 123 Fed., 507, 517; 1903.)

Here the matter is put upon its true ground, namely, the seventh amendment and Federal legislation, and it may well be that the preceding extract in reality proceeds upon the same idea.

We have, then, three matters to consider when legal and equitable procedure in a Federal court are before us: (1) The constitutional recognition of law and equity in the provision conferring jurisdiction upon the courts of the United States; (2) the seventh amendment; (3) Federal legislation providing for distinct procedure at law and in equity. The first of these is the basis of some or even of all but the last of the judicial pronouncements above quoted. Yet if we go back to the fountain head of these statements in the original dictum of Taney, C. J., we see at once that he had in mind the remedy, not the form of procedure, and hence that his remarks afford no ground for assuming that the words "at law and in equity" require a distinct procedure. Rather, those words were meant to give to Federal courts each of the two great classes of remedies of the Anglo-American legal system. Accordingly many dicta have recognized that a substantial, not a formal or procedural distinction is the one recognized. For instance, that is evidently what Curtis, J., had in mind when he spoke of "the equity law recognized by the Constitution and by acts of Congress." (Neves *v.* Scott, 13 How., 268, 272; 1851.)

So, also, in the following:

"The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles." (Davis, J., in Thompson *v.* Railroad Companies, 6 Wall., 134, 137; 1867.)

There remains one remark of an eminent judge sitting in a circuit court of appeals:

"But in the courts of the United States the distinction between actions at law and suits in equity and between legal and equitable defenses is carefully preserved, because it is clearly recognized in the Constitution and laws of the United States." (Van Devanter, J., in Anglo-American Land Co. *v.* Lombard (C. C. A.), 132 Fed., 721, 731; 1904.)

It is submitted that this means that the distinction between the remedies and the substance of the defenses is recognized by the Constitution and the distinction between the modes of procedure is established by the statutes.

In the requirement of the seventh amendment, that the right of trial by jury shall be preserved, we find a more serious matter. That this is the true basis of separate procedure at law and in equity has been recognized by many judges:

"The Constitution in its seventh amendment declares that 'in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.' In the Federal courts this right can not be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact." (Field, J., in Scott *v.* Neely, 140 U. S., 106, 109; 1890.)

This evidently does not mean that the learned justice thought such a blending might not be provided for, if it did not impair the right to jury trial of legal issues. No such blending was permissible under the existing practice, and the reason is pointed out, namely to preserve the right to jury trial. If, therefore, that right can be preserved, such a blending of legal and equitable issues in one cause might be established by proper authority. That this is so, the Supreme Court of the United States has made clear abundantly in passing upon legislation in territories where statutes had done this very thing:

"The question is whether this act of the territorial legislature in substance impairs the right of trial by jury. The seventh amendment, indeed, does not

attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself this prerogative. So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law." (Brewer, J., in Walker *v.* Railroad, 165 U. S., 593, 596; 1896.)

"As in Oklahoma [then a Territory] the distinction between actions at law and suits in equity is abolished—each action being called a civil action, whatever the nature of the relief asked * * *—we perceive no reason why the case may not proceed in the trial court under the pleadings as they have been framed, with the right of the defendant to a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode." (Harlan, J., in Black *v.* Jackson, 177 U. S., 349, 364; 1899.)

In that case the suit was, in form, one for a mandatory injunction. The court held that the seventh amendment did not require that the cause be brought anew as an action of ejectment, but that a jury trial of the legal issue as to possession would suffice.

This construction of the effect of the seventh amendment upon procedure at law and in equity, which must commend itself to everyone's good sense, is borne out, moreover, by what the court, speaking through Mathews, J., said in Ex parte Boyd (105 U. S., 647, 656; 1881):

"And the remaining question, therefore, becomes, not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as whether it can in any wise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether by the adoption of that instrument all progress in the modes of enforcing rights, both of law and in equity, was arrested and their forms forever fixed. To state the question is to answer it."

It would seem, therefore, that:

(1) The Constitution gives the courts both legal and equitable jurisdiction; that is, the power to give both legal and equitable remedies, so that neither may be taken away by legislation.

(2) The Constitution preserves a right to a jury trial of legal issues triable only in an action at law under the common law, which can not be taken away, though it may be waived by the party entitled.

(3) If the remedies and the right so secured are not taken away or impaired the mere manner in which the remedy shall be sought and the issue to be tried shall be presented is subject to legislative control.

(4) Hence, if anything, legislation only requires the present complete and absolute separation of law and equity in Federal procedure.

The second question may well be, How far may rules of court achieve the desired reforms and how far must they be achieved by legislation? As has been seen, the judiciary act of 1789, chapter 20, section 16, recognized the substantive distinction. But section 19 of the same act recognized, or at least assumed, a procedural distinction. Section 21 of that act and section 36 of the act of May 8, 1792 (1 Stat. L., 276), do the same. Since that time the distinction has been assumed in all subsequent legislation. Whether it is required thereby is not so clear. But the Federal courts have said that it is so emphatically so many times that resort to legislation may be the better course. There is good precedent, however, for allowing amendment from law to equity and vice versa without express legislation, in the decision of Chief Justice Doe, of New Hampshire, in Metcalf *v.* Gilmore (59 N. H., 417, 433). In that cause the court held that the fact that the statute of jeofails allowed amendments at law and that amendments were always allowed in equity, coupled with the union of legal and equitable powers in one court, was enough to justify such amendments. Doe, C. J., said:

"Against an amendment based on the existing unity of jurisdiction it might be asserted that nothing can be done in court without a precedent, and that there is no precedent for such an amendment. But the unity of jurisdiction authorizes such an amendment as could have been made if the unity had been coeval with the common law. In a writ of entry on a mortgage it is found that

the mortgage should be reformed. If law and equity had not been disjoined in England (as by the true principle of the common law they could not be) another suit with new process and new notice, for the reformation of the mortgage, would be no more necessary than a new suit to amend a town clerk's record or an officer's return, a reformation of which becomes necessary and is made during the trial. By fair implication the legislative act uniting the disjointed function prescribes whatever new proceedings are requisite for giving due effect to the union."

In some ways the Federal courts are much better situated to allow this desirable practice without legislation than was the Supreme Court of New Hampshire. In the Federal courts the practice at law by statute conforms to the State practice, which almost everywhere allows amendment from law to equity, or vice versa. The practice in equity by statute is subject to regulation by rules of court. With full legal and equitable jurisdiction in all the Federal courts it would seem that, unless the long line of dicta above quoted afford an insuperable obstacle, the power to make equity rules might well be invoked and obviate the interference of Congress. Moreover, there is good Federal precedent for such amendment without even a Federal equity rule. (Schurmeyer *v.* Life Ins. Co., 171 Fed., 1.)

Thirdly, we must ask what reforms in the relation of law and equity in Federal procedure are desirable? It is submitted that three are desirable at once: (1) Power of amendment from law to equity, and vice versa; (2) power to allow equitable defenses and equitable replications at law; (3) power to grant anciliary equitable relief in pending legal proceedings without requiring an independent suit with new process.

The first of these raises no questions other than those already discussed. Its desirability would seem beyond argument. It exists not only in the 27 code jurisdictions, but also in the more advanced common-law jurisdictions. As has been seen, in New Hampshire it exists by judicial decision as a corollary of the granting of legal and equitable jurisdiction to one set of courts. Noteworthy statutes giving the same power, where legal and equitable procedure are kept distinct, are: Massachusetts, Revised Laws, chapter 173, section 52; Illinois, Laws of 1907, page 435, section 40. In this respect practice in the Federal courts is far behind that in the State courts.

The second proposed reform involves three items: (*a*) Allowing equitable defenses at law, (*b*) allowing equitable cross-demands in legal proceedings, where to make one's defense he must have affirmative equitable relief, such as reformation, cancellation, or specific performance, (*c*) allowing equitable replications at law, as, for instance, where a release under seal is set up as a defense and the plaintiff desires to avoid it on the ground that it was obtained by fraud. That this is not permitted in the Federal courts, see Hill *v.* Northern Pacific R. R. Co. (C. C. A., 113 Fed., 914). All of these powers are possessed by the majority of our State courts, and their desirability need not be argued. The sole difficulty lies in the necessity of carefully preserving the constitutional right to jury trial of legal issues. This has not proved a serious obstacle in the 27 code jurisdictions, though the legislative solutions thereof have not always been happy. Three classes of cases have arisen under codes and practice acts: (1) Pure equitable defenses, used defensively only. Here many jurisdictions submit the facts to a jury, as the party who interposes the defense at law may not well complain thereof. But, if the court itself passes on the facts on which such a defense is predicated and directs what legal effect shall be given to the facts so determined, according to what a court of equity would have done in a separate suit for that purpose, no constitutional right is impaired. (Marling *v.* Railroad Co., 67 Ia., 331.) (2) Cross-demands for equitable relief of an affirmative nature, which, if granted, will cut off or dispose of plaintiff's case, but if denied will leave his case yet to be tried on its purely legal issues, or some of them. Here the latter only are triable to jury as of constitutional right. Hence the court may try the claim for equitable relief, and then, if any legal issues remain to be tried, a jury trial may be had. (Fish *v.* Benson, 71 Cal., 428; Stono *v.* Weiler, 128 N. Y., 655.) (3) In some cases a legal cross-demand has been set up in a suit in equity. Here the party who so sets it up and asks that it be adjudicated in the equity cause has been held to have waived a right to jury trial. Yet the other party may not choose to waive such right. Then the question obviously ought to depend upon whether, as may sometimes be done, this legal issue can be used defensively in equity under the chancery practice. If so, obviously no jury trial may be had; if not, the right must be preserved. (Larkin *v.* Wilson, 28 Kan., 513; Davison

v. Associates of the Jersey Co., 71 N. Y., 333.) Some of the codes have tried to formulate these rather obvious conclusions, to which the courts have come wherever legislation would allow them by the use of general phrases, such as "actions for the recovery of money only," "legal issues," "equitable issues," and the like. Such formulas have made much difficulty, since questions have arisen as to how far they may have altered the preexisting rights as to mode of trial. On the whole, no better formula is to be found than that announced by Harlan, J., in Black *v.* Johnson (177 U. S., 349, 364), that a party must have as of right "a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suit in equity are determinable in that mode."

Still another difficulty may be suggested here, namely, the different mode of review in the Federal courts of actions at law and suits in equity, respectively. It may be asked what is to be done where an action at law involving equitable defenses or an equitable replication must be reviewed? Shall there be error as to the legal part and appeal as to the equitable part, which would produce great confusion? The question is not a new one. In many of the code States separate forms of review for law and equity were preserved till recently, and hence this very situation arose. The solution adopted was to look to the nature of the main proceeding in the course of which equitable or legal claims had been interposed. It was stated thus by Maxwell, C. J.: "The rule seems to be that where the action is at law to review the action itself or a final order in any special proceeding therein the proper practice is by petition in error; but where the action is in equity the decree itself or any special proceeding in the action * * * may be reviewed on appeal." (Morse *v.* Engle, 26 Nebr., 247.) In like manner in Massachusetts, where certain equitable defenses may be made at law, an action at law in which such a defense is raised is reviewed by exceptions like any other action at law. (Page *v.* Higgins, 150 Mass., 27.)

There remains the matter of injunctions to preserve the status quo pending actions at law. It is a needless expense to require a separate suit with new process and pleadings for this purpose. But no statute is necessary here. The Supreme Court has power by equity rules to prescribe the forms of procedure for exercise of all equitable powers of the court. Surely it may provide that this power of granting an injunction auxiliary to a pending legal proceeding may be exercised upon petition and notice in the legal controversy itself. Indeed it would seem arguable that it might by rule allow a plea or answer or replication in an action at law to serve the purpose of a bill, and so, without legislation, provide for equitable defenses and equitable replications.

II.

MR. SHELTON'S RESOLUTION.

If this resolution is taken literally, no one can have any objection to it. Certainly none of those who advocate reform of procedure propose or have proposed that a court in deciding a controversy should, or should be permitted to, consider anything not legally before it in pleadings, by way of judicial notice, in the form of a presumption or in the form of legal evidence. What they urge is that when a cause is before the court in the form of legal evidence the court should be empowered to act upon it, and its decision should not be set aside, even if not exactly presented by pleadings, unless some injury has resulted from want of notice of the case or defense to be made. In other words, they urge that pleadings should have but two functions: (1) To furnish notice of the claims, defenses, or cross demands of the parties; (2) to make a record of what has been passed upon, so as to furnish a basis for subsequent pleas of res judicata. This matter was fully argued in our report a year ago. We need not repeat the arguments then urged. It is enough to say that if the pleadings give due notice they subserve every useful purpose of judicial presentation of a cause.

It is suspected, however, that the purpose of the resolution is to impose upon the committee a doctrine, which has been much urged, to the effect that a court ought not to be permitted to deal with a cause in any way unless and until a technical statement of a cause of action, including all the legal elements of the case, is before it. It has been asserted somewhat dogmatically (*a*) that this is a fundamental requirement of the judicial administration of justice, without which there can be no law; (*b*) that it has always obtained in all legal systems; (*c*) that without it constitutional government is impossible, since the courts

would operate arbitrarily and despotically. As to the first, it may be enough to say that justice is very well administered to-day in many kinds of cases without anything of the sort—in magistrates' and justices' courts on indorsed writs or informal bills of particulars, in the trial of claims against the estates of deceased persons in many jurisdictions on informal claim bills, in the English courts and in the courts of Canada on informally indorsed writs or informal statements of claim, designed to afford notice. As to the second, it may be remarked that in all three periods of Roman procedure the plaintiff's case was stated in a manner which would be open to demurrer at common law, and that in modern German procedure, after citation containing a mere notice, the issues are settled by a process of tentative pleading and amendment between court and counsel in which common-law demurrers would lie to nearly every pleading. As to the third, in view of the wide powers of interpretation and ascertainment of the law which our common-law system confides to the courts, it seems puerile to tie the courts hand and foot with procedural details lest they act arbitrarily. But notice pleading affords no more scope for arbitrary action than a pleading which requires a case to be stated with all its legal elements in common-law form. The action of the court on the case made by the proofs is always open to review, and that is the real concern of the law and of society; any deprivation of a fair chance to meet the case so made is also perfectly open to review. Variance ceases to be a matter for technical sparring for advantage and becomes one of substantial rights, namely, Has the party who claims it had a fair opportunity to meet the case against him?

It has been urged that a court can not act until a case is fully and technically made in a pleading before it. Why not? Courts do so act in the cases above enumerated and in others set forth in the report last year with no untoward results. The truth is the requirement of a technically correct pleading to sustain a good case fully proved by legal evidence after a fair hearing is purely historical. It arises from the common-law mode of review by writ of error at a time when the parchment judgment roll was the sole mode of setting forth what the tribunal had done. Unless a case was made by the pleadings to sustain the judgment rendered, the reviewing court had no means of knowing upon what the judgment proceeded. To-day, with better modes of review in vogue in almost all jurisdictions and with ample facilities for review of the actual case, to continue to review the pleadings and to require new trial of a good case because of a bad pleading, supposing all requirements of notice have been duly fulfilled, is an anachronism. The committee has no desire to see anything judicially considered that is not juridicially presented, but it does desire to see the modes of juridical presentation in many of our jurisdictions much simplified.

ROSCOE POUND
(For the subcommittee).

SCHEDULE F.

MEMORANDUM OF DISSENT OF MR. ALLEN.

I very heartily approve of all the recommendations of the report except Schedule D. The decision rendered by the Court of Appeals of New York in the case you mention certainly presents an instance in which it would be highly desirable to have a review in the Supreme Court of the United States and a uniform construction of the Constitution of the United States; but I hesitate at any extension of the jurisdiction of that overloaded court. I fear that the amendment proposed would add materially to the number of cases taken to that court, and that in a very large majority of them the inconvenience would outweigh the advantage. Great delay, expense, and inconvenience inevitably result from an appeal to the Supreme Court of the United States, and we ought to be exceedingly careful that we do not open the door wider than necessity requires.

STEPHEN H. ALLEN.

BRIEF FOR AMERICAN BAR ASSOCIATION IN SUPPORT OF BILL RELATING TO PROCEDURE OF UNITED STATES COURTS.

[S. 3750; H. R. 16461.]

This bill was drawn by a committee of the American Bar Association. It has been under consideration by that associaton for five years. At the meeting at Seattle in August, 1908, it was much discussed and received the almost unani-

mous support of a large and representative meeting of the association. The bill was presented to the Sixtieth Congress, was discussed fully before the Judiciary Committee, and was amended to meet the criticisms of some members of the committee. In its amended form it passed the House of Representatives unanimously February 6, 1911 (H. R. 31165). It was approved unanimously by the American Bar Association at its last meeting in Boston. The bill represents and was drawn and approved by three professional elements—the bench, the practicing lawyer, and the university.

I. So far as procedure in appellate courts is concerned, what we wish to accomplish is this: That in the consideration in an appellate court of a writ of error or appeal judgment should be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming, as many courts now do, that if there has been a violation in some particular of some rule of law that violation has been prejudicial to the result. The effect of the first section of the bill that is now before you is to enact that the presumption shall be that the decision below was right, and that if it was erroneous in some detail the error did not affect the result.

Perhaps no better argument can be stated for this proposition than a passage in the opinion of Mr. Justice Martin, of the Court of Appeals of New York. It expresses the great embarrassment that lawyers feel in the trial of important cases. In Lewis *v.* The Long Island Railroad Co. (162 N. Y., 50, 67) the judge delivering the opinion of the court says:

"After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge and the almost unerring correctness of his rulings. When the number and variety of the questions raised are considered we are surprised not that a single error was committed, but that there were not many more."

In other words, our procedure is such that it is impossible, even with a judge of "almost unerring correctness," to get a verdict on the trial of an intricate cause that will stand the test of an appeal. It needs no argument to show that such procedure needs revision. The State of New York within a few years created a commission to inquire into the causes of the law's delay. Several judges of the supreme court of that State were examined before the commission. Presiding Justice Hirschberg said, in the course of his examination:

"I think that one great difficulty is that our system is distinctively an appellate system, and it is based upon the fundamental idea that a trial and a decision are always wrong. The result of it is that people indulge in litigation because the opportunities are great. They are sure of two appeals, and until the final decision is made they are in no hazard." (Law's Delay Commission Report, p. 269.)

"I have always thought it was a fatal feature of our judiciary system * * * the idea that if a man tries a suit and loses, he can appeal on the assumption that that was wrong, instead of appealing on the assumption that it was right. (Ibid., p. 270.)"

Mr. Justice Scott agrees with this view:

"Mr. Hayes. Have you any suggestion to make on appellate procedure?

"Judge Scott. You should change that rule of presumption; in the first place I think the appellant should have cast upon him the burden of establishing that there had been error below, and also of showing that that error had been prejudicial. None of use is so wise that he can try a long case without committing some error. In addition to that the appellate division should have the power of awarding judgment. (Ibid., p. 288.)"

Mr. Justice (now Senator) O'Gorman says:

"One of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits.

"We have a rule in our State that the commission of an error upon the trial of a cause by a trial justice is presumptively prejudicial to the appellant, and instead of the appellant being required to persuade an appellate court that he has suffered substantial wrong, the moment that he can place his finger on a technical error the burden is at once shifted, and the respondent required to persuade the court that there was no harm following that particular ruling. Now, we all know, and there are very few who seek to vindicate the practice,

that very many cases are sent back from the appellate division upon alleged errors which have never affected the merits of the case. (Ibid., pp. 316–317.)

"At the present time nearly every defeated party is willing to take a chance of securing a reversal on appeal. They have every encouragement. (Ibid., p. 319.)"

In opposition to all the rules of technicality, which work such injustice and cause such delay, we urge that laid down by Chief Justice Marshall in Church *v.* Hubbart (2 Cranch, 232):

"It is desirable to terminate every cause upon its real merits if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so."

The amendment proposed is the equivalent to that already adopted by the Legislature of New York in criminal cases. We quote from the opinion of the court of appeals in People *v.* Strollo (191 N. Y., 42).

At pages 61, 67, the court said:

"Under the statutes our powers and duties in capital cases are strictly correlative. While we have power to reverse in the interests of justice, even where no exceptions are taken, it is also our duty to disregard errors which, although excepted to, do not affect the substantial rights of a defendant. Guided by this rule, we feel contrained to hold that none of the general criticisms referred to under this head present sufficient grounds for reversal. * * *

"These various elements of the question, considered in connection with the functions and powers of this court, bring us face to face with the situation that is apparently paradoxical but actually logical. That is to say, we might have a condition in which we would be compelled, in a civil case, to grant a new trial for a loss of original documentary evidence, although under similar conditions, in a case involving human life and liberty, we may be bound to deny such relief. And why should this seemingly anomalous difference exist? Because this is a court of statutory origin and vested with none but statutory jurisdiction. Thus it happens that in civil cases our powers are limited to the review of errors which are raised and presented by exceptions, while in criminal cases we are not only empowered but commanded to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Proc., sec. 542.) This power of review on criminal appeals is still further broadened in capital cases by the legislative direction that "when the judgment is of death, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below." (Code Crim. Proc., sec. 527.)

Similar legislation to that now proposed has been adopted in Illinois, Kansas, Ohio, and Wisconsin, and by constitutional amendment in California.

In dealing with this important subject, we ask you to put yourselves in the attitude of a lawyer who has a righteous cause, and who naturally desires to bring it to trial and obtain final judgment for his client as soon as possible. Is not this the attitude you always want to occupy? Doubtless we are sometimes called upon to defend a client who has no defense upon the merits. As long as the law gives the right to interpose a technical defense and prolong the litigation, the lawyer is blamed by many if he does not exert his skill to the uttermost for that purpose. When we look at our profession from the standpoint of the Commonwealth; when we consider that we are not only attorneys for a client but officers of the court, and charged with an important part in the administration of justice, we must admit that we occupy a humiliating position whenever we undertake to defeat it. It may be a lawyer's duty to occupy this position under the existing system. All the more, therefore, is it our duty as citizens to endeavor to reform the system, so that these means of procrastination shall no longer be available.

The objection that is commonly taken to this doctrine, so far as it applies to the review of cases that have been tried before a jury, is that expressed in a letter that we have received from one of the Federal judges, to whom we submitted the proposed bill. He puts it thus:

"If an appellate court either affirms or reverses because of its own opinion as to the merits, it substitutes a trial by judges for a trial by jury."

Our reply to this is that it misconceives the scope of the proposed reform. So far from depriving the verdict of the jury of its value, it tends to establish the verdict. Long experience in the trial of cases before a jury and conversation

with intelligent jurors of our acquaintance has convinced us that jurors pay much less attention to fine points of evidence or to nice distinctions in the charge than judges generally seem to suppose. In more than half the cases where judgments have been reversed on questions of evidence, the ruling in the court below did not affect the verdict in the slightest degree. This being the case, it is unjust that the parties should be put to the expense and delay of a new trial.

Therefore, as practicing lawyers, it is clear to us that the presumption of the appellate court should be that a ruling on the evidence, which it deems erroneous, did not affect the result. It should be for the defeated party to satisfy the appellate court that the ruling was actually prejudicial to him upon the merits.

While we can not say that any of the Federal courts has ever sinned as much as some of the State courts, yet we would put upon the statute book a uniform rule for all the circuits, which will embody the rule that prevails in some of them, and which will make it impossible for some of the decisions to be made that the former chairman of this committee, Mr. Lehmann, of St. Louis, adverts to in an address he has recently delivered. We call attention to one, because it seems to us, on the whole, the most flagrant. Yet, under the existing system in some States, it is not only possible, but it has actually occurred. That was an indictment for rape. The proof was clear and the man was convicted, but a writ of error was sued out and the lawyer discovered this defect in the indictment. The constitution of Missouri requires that the indictment should conclude "against the peace and dignity of the State," but in engrossing the indictment the article "the" was omitted before the word "State." The Supreme Court of Missouri held, in State *v.* Campbell (210 Mo., 202), that the omission was fatal, although they said (p. 234): "The testimony as disclosed by the record in this case was amply sufficient to warrant the court in submitting the question to the jury." They reversed the judgment of conviction. The indictment being held void, of necessity the guilty man would go free unless a new indictment should be found and the case tried again.

There are other cases that might be cited where courts on appeal, particularly in criminal cases, have stretched the rule of error to the furthest limit. It is not in the interest of justice that this should be permitted. The maxim of the common law was that the judge himself is condemned when he acquits the guilty; but we have come, in many jurisdictions, to the very opposite of that, dependent, we may say, a little upon the character and temper of the judge who happens to sit on the case. Some judges are more technical than others and attach more importance to points like this than others do. That ought not to be the condition of the law. There ought to be a general rule formulated by Congress which shall control in all the circuits of the United States, so as to make these reversals for purely technical defects impossible in any of the Federal courts.

Society has an interest in the punishment of the guilty. Under our system the accused has every chance in the first instance. The judge must charge that he can only be convicted if the jury find him guilty beyond a reasonable doubt. His counsel will probably argue that it is better that 99 guilty men should escape than that one innocent man should be convicted. If, after all that, the jury find the accused guilty, there is a strong presumption of his guilt; and it ought not to be possible for a person in that situation to be allowed to take advantage of such technical errors, which do not affect the merits and which have nothing to do with the question of his guilt or innocence. We do not always get the most skillful prosecuting attorneys, and under the present rule, as it is often administered, there is required of them almost preternatural skill and foresight in order to guard against question and objections taken in this way.

II. The second clause of the bill was drawn so as to provide a method by which a verdict on questions of fact may be taken on the trial, reserving questions of law for more deliberate consideration, either by the trial judge or in the appellate court. It authorizes the court to direct judgment to be entered upon the verdict or upon the point reserved, if conclusive, as its judgment upon such point reserved may require.

This amendment gives additional value to the trial by jury. It will prevent the delay, expense, and consequent injustice caused by new trials upon every issue, when the judgment of the appellate court differs from that of the trial court upon some point of law.

To quote from the opinion of the New York Court of Appeals in a recent case:

"It frequently happens that cases appear and reappear in this court, after three of four trials, where the plaintiff on every trial has changed his testimony, in order to meet the varying fortunes of the case upon appeal."

This is a direct encouragement of fraud and perjury. (Walters *v.* Syracuse Rapid Transit R. Co., 178 N. Y., 50.)

On the other hand, a just cause may be lost on the second trial because of the death of witnesses, or their departure to parts unknown.[1]

The practice we propose is the common-law practice. It prevails in England to-day under the judicature act. In that country final judgment is rendered on appeal in 90 per cent of the cases in which the judgment below is reversed; and in only 10 per cent of the reversals is a new trial ordered.

As a matter of fact, the existing procedure in criminal law was framed at a time when it was really needed to protect the criminal, especially from political prosecutions. This is no longer necessary. The criminal is well protected. He must be first indicted by a grand jury of at least 13 men. They say, in finding the true bill, that the man is guilty of the offense. As Sir James Stephen points out in one of his books on criminal law, it is a remarkable thing to say that a man who by 13 of his neighbors has been declared guilty shall start off on his trial with a presumption of innocence. Still he does. The courts tell the jury all the way through, "This man starts and carries through the trial with him this presumption of innocence." Yet at least 13 of his neighbors have already said that he is probably guilty of the crime of which he is accused. The presumption of innocence must be rebutted by sufficient evidence before the jury beyond a reasonable doubt, whereas in a civil case merely a preponderance of the evidence is sufficient. Then, when the prosecutor overcomes all those advantages of the accused, there must be a unanimous verdict. One man can hold up the whole case or compel a mistrial. Again, under the present procedure, if there has been any technical error, even though it does not affect the merits, there must be a new trial. Every rule possible is made to protect the criminal.

American courts are far more technical than the English. They have amended their old law. We have adhered to it. They know that the intricacy and technicality of criminal procedure are obsolete, and no longer fitted for civilization. We pride ourselves on our business capacity and our way of doing things in a common-sense way, and yet we cling to these old technicalities that the Englishman dropped 30 years ago. They pass over little things that we get a new trial for; they decide cases upon the merits more expeditiously and more in consonance with justice than we do.

The American Bar Association, speaking for the bar of every State, urges upon Congress to reform these abuses and redeem the promise of Magna Charta that justice shall be denied or delayed to no man, and that the administration of justice shall not be so cumbrous, dilatory, and consequently expensive that it shall be obtainable only by the rich.

In the President's message, sent to Congress December 21, 1911, we find the following recommendation (p. 16):

"The American Bar Association has recommended to Congress several bills expediting procedure, one of which has already passed the House unanimously, February 6, 1911. This directs that no judgment should be set aside or reversed, or new trial granted, unless it appears to the court, after an examination of the entire cause, that the error complained of has injuriously affected the substantial rights of the parties, and also provides for the submission of issues of fact to a jury, reserving questions of law for subsequent argument and decision. I hope this bill will pass the Senate and become law, for it will simplify the procedure at law."

The President's experience as a lawyer and a judge gives especial weight to this recommendation. We submit that it should receive careful consideration.

We conclude with a quotation from the great Italian statesman, Cavour, which seems to us timely:

"I am not an alarmist; nevertheless, without being one, I think we can see at least the possibility, if not the probability, of stormy times. Well, gentlemen, if you wish to take precautions against these stormy times, do you know the

---

[1] A notable instance of the delays under the present system is the Hillmon case (145 U. S., 285; 188 U. S., 208). Second judgment of reversal was 23 years after trial begun. In Springer *v.* Westcott (166 N. Y., 117), there were four appeals. The recovery was $900—for the contents of a trunk.

best way? It is to push reforms in quiet times, to reform abuses when these are not forced upon you by the extremists."

EVERETT P. WHEELER, *New York*,
RUSSELL WHITMAN, *Illinois*,
R. E. L. SANER, *Texas*,
(For American Bar Association.)

BRIEF OF EVERETT P. WHEELER, ROSCOE POUND, AND FRANK IRVINE FOR AMERICAN BAR ASSOCIATION.

Three objections are urged to the former bill referred to by its Senate number, 4029. They relate to the first section of the proposed bill, which has for its object to authorize amendment from law to equity and vice versa. The objections summarily stated are:

(1) That the distinction between procedure at law and procedure in equity is essential, so that it is impossible, by amendment, to transform a proceeding of the one sort into the other.

(2) That the provision in question would break down an established practice and give rise to great confusion.

(3) That the effect of the measure would be simply to protect the incompetent pleader and compel the court to correct his mistakes.

(4) That the power exists without a statute.

I.

The question whether the distinction between procedure at law and in equity is essential and fundamental may be argued in two ways.

(*a*) From actual experience in systems where the distinction has been done away with;

(*b*) A priori. Abundant judicial experience is at hand in about 30 code jurisdictions in the United States; also in England, Ontario, and Australia. In the jurisdictions in question the practice goes very far beyond anything which is proposed in the act in question. Perhaps the best statement of the modern view on this subject may be found in Sillaway *v.* Toronto (20 Ont. 98), in which case Boyd, C., says: "Modern procedure endeavors to work out the right and liabilities of all parties as far as possible in the same action."

Doubtless the code provisions in the States where code procedure obtains are sufficiently well known. It may be worth while, however, to call attention in this connection to section 24 of the English judicature act, and to the Ontario judicature act (sec. 57, subtitle 12). The latter statute was enacted as long ago as 1881, and no question has ever been made but that it works admirably.

In addition, reference should be made to Massachusetts revised laws (chap. 173, sec. 52), and Illinois laws of 1907 (p. 435, sec. 40), which provide for amendment from law to equity and vice versa.

In the light of the foregoing it is folly to contend at the present day that any confusion can arise from permitting a cause once instituted on one side of the court to be transferred to the other without the necessity of discontinuance or dismissal and the bringing of an entirely new proceeding.

It is not the purpose nor will it be the effect of this bill to obliterate or confuse the distinction between law and equity. That there is necessary in the nature of things any great distinction in the procedure by which legal and equitable rights are to be adjudicated and legal and equitable remedies administered by no means follows. That there is necessary such a difference in procedure as to render it impossible to amend proceedings begun on one side of the court so as to conform them to the practice on the other side, we strenuously deny.

It is not necessary in support of this measure to advocate any merging or confusion of legal and equitable rights and remedies. It is not necessary to advocate any assimilation between the two systems of procedure. The bill carefully preserves the power to proceed under existing forms. Its sole object is to prevent a suitor from dismissal because it develops during the progress of the case that he has mistaken his remedy. The bill does not authorize the court under pleadings at law to administer equitable relief, or under pleadings in equity to proceed as at law. It merely authorizes the court to permit the

parties to amend their pleadings so as to conform the proceedings to the practice prevailing on the appropriate side of the court. To use expressions taken from the brief of Messrs. Doran & Reath it is not an "essential" or "unchangeable" or "changeless" practice that throws the suitor entirely out of court and compels him to commence anew under the circumstances indicated.

Over against the pronouncements of the judges in earlier cases under the New York code of 1848, which are cited in the brief of Messrs. Doran & Reath, we may put the following from a recent decision in a well-known code jurisdiction:

"The cold, not to say inhuman, treatment which the infant code received from the New York judges is matter of history. They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to incorporate into the code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators."

Courts no longer deal with practice acts and statutes relating to improvement in procedure in this spirit. The Supreme Court of the United States, especially in recent cases where it has been called on to review proceedings from jurisdictions where a newer procedure obtains, has taken an attitude quite different from that which was taken in that court when the codes were first enacted. It will suffice to invite a comparison of McFaul *v.* Ramsey (20 How., 523, 525), Bennett *v.* Butterworth (11 How., 669), Farni *v.* Tesson (1 Black, 309, 315), with the remarks of Mr. Justice Matthews in Ex parte Boyd (105 U. S., 647, 656), and Mr. Justice Harlan in Black *v.* Jackson (177 U. S., 349, 364).

It should be remembered that equity, as it has been put, is "a system of remedial law." (Langdell, Brief Survey of Equity Jurisdiction, 22, 23.) One of the greatest legal scholars of modern times has told us that "the day will come when lawyers will cease to inquire whether a good rule be a rule of equity or of common law," and that it will suffice "that it is a well-established rule administered by the high court of justice." In other words, outside of the United States, a very complete fusion of law and equity in substance is going forward rapidly and producing no ill consequences; but nothing so radical is proposed by anyone for our courts. All that is proposed is that the necessity of throwing a party out of court because his proceeding is on the wrong side of the court be put an end to, and that, without the delay, expense, and annoyance of bringing a new proceeding, he be permitted to transform the misconceived proceeding into the proper one.

When the old procedure was in force in England, in a well-known case Vice-Chancellor James, afterwards Lord Justice James, said, on one occasion:

"I am obliged to do that which is almost a scandal to our law, drive a man to * * * the other side of Westminster Hall and say I will dismiss your bill without prejudice to an action." (Hood *v.* Northeastern R. Co., 8 Eq., 666.)

See also the remarks of Dr. Odgers, in A Century of Law Reform (208).

These remarks were made with reference to a system where law and equity were administered in different courts, and consequently amendment from one to the other was substantially impossible. In our Federal courts there is very much less excuse for such a situation, because in those courts law and equity are administered by the same tribunal, and it is a mere matter of the form of proceeding. Hence the scandal, as Vice Chancellor James called it, is even greater.

One concrete example from the United States reports may be adduced to show how the separation of law and equity in procedure too often works in practice. A building association took out a policy of insurance in the sum of $2,500 on a building. The building was vacant at the time, and was known to be vacant by the agent who issued the policy; but the policy contained the usual vacancy and nonvacancy clause, and no slip providing for vacancy was attached. Upon destruction of the building by fire action was brought upon the policy in a State where the State can administer both legal and equitable relief in the same proceeding. The cause was removed to the Federal circuit court by the insurance company. Here it became necessary for the insured, at its peril, to determine whether it would proceed at law on a theory of estoppel or would proceed in equity for reformation of the policy. As some 29 States in which the question had been passed on had held there was an estoppel available at law in such cases, the plaintiff went on at law accordingly. Trial was had and a verdict and judgment for the building company resulted. This judgment was affirmed on error by the circuit court of appeals. (Northern Assurance Co. *v.* Grand View Building Association, 101 Fed., 27.)

On certiorari the Supreme Court of the United States reversed the judgment on the ground that parol evidence was not admissible at law to show this estoppel. (Northern Assurance Co. *v.* Grand View Building Association, 183 U. S., 308.)

Whether any relief might be had in equity on the case presented the court could not consider. (Northern Assurance Co. *v.* Grand View Building Association, 203 U. S., 106, 107.)

Thereupon the building association sued in the State court in equity for reformation of the policy, and limited its claim to $2,000 so as to prevent removal. The State court granted reformation and decreed payment of the sum claimed, and this decree was affirmed by the State supreme court on appeal. (Grand View Building Association *v.* Northern Assurance Co., 73 Nebr., 149.)

The case was then taken on error to the Supreme Court of the United States, which this time affirmed the decree on the ground that its first decision merely held that the plaintiff was on the wrong side of the court. (Northern Assurance Co. *v.* Grand View Building Association, 203 U. S., 106.)

Thus eight years of litigation, involving two trials, one hearing in the circuit court of appeals, one in the State supreme court, and two in the Supreme Court of the United States were required to recover $2,000 of insurance on the right side of the court.

Surely comment upon such a situation, in view of the practice which prevails in the great majority of English-speaking jurisdictions in the twentieth century, is unnecessary.

II.

The second objection is that established precedents would be broken down, and that confusion in practice for many years would result. To this proposition, which is laid down in a somewhat dogmatic and confident a priori fashion, there is a ready and conclusive answer. Exactly such provisions as are contained in the act proposed have been in force in Massachusetts and in Illinois for several years, and there has not been the slightest complaint that anyone has been injured thereby, or that any confusion has resulted. On the contrary, testimony is uniform that a considerably more expeditious procedure and saving of expense has resulted.

III.

The third objection is that the measure proposed would operate merely to protect the incompetent pleader from his blunders, and that it would compel the court to assume the burden of correcting his mistakes. With respect to the first two propositions involved in this objection, reference may be made to the Grand View Building Association litigation above related. There the mistake was not that of an incompetent blunderer. On the contrary, the condition of the law was such that counsel of great experience and learning, finding themselves compelled to choose between two lines of authority, chose the line which had the support of an overwhelming majority of jurisdictions which had passed upon the question, and a line which was adopted by the Circuit Court of Appeals for the Eighth Circuit. Ultimately the judgment of the Supreme Court of the United States was that they had chosen the wrong line to the right result. It ought to have been possible for them to change the proceeding then and there into a suit for reformation. Instead of this, they were compelled to bring an entirely new proceeding, involving considerable delay and expense.

With respect to the other proposition involved in the objection, it is enough to say that the parties themselves will seek the amendments. All that the court will do is what it does now—clearly determine whether a proceeding is properly one at law or in equity. This done, instead of the party being thrown out of court and compelled to begin anew, he will be permitted to transform his proceeding into the one which he should have taken in the first instance.

IV.

The last objection is that no statute is necessary to confer the power in question upon the Federal courts. We should like to think that this is so, and admit that a strong argument to that effect is possible. On the other hand, it must be admitted that many of the most eminent judges upon the Federal bench believe the contrary. The case of Schurmeier *v.* Connecticut Mutual Life Insurance Co. (171 Fed., 1) is by no means conclusive to the question. In that case

one of the three judges who sat dissented, making a very strong argument upon the basis of the existing statutes and decisions. We are advised that Federal courts in other circuits which are not bound by the decision in question are refusing to follow it. Under such circumstances it would seem that the simple statutory relief provided for ought to be granted.

V.

The particular reform in equity practice embodied in section 2 is analogous to that which has so long been adopted at common law. A set-off for many years has been pleadable there. In the code States it is called a counterclaim. Before this practice was adopted the satirists keenly called attention to the injustice of the former method. For example, Haliburton, in Chapter V of Sam Slick:

"JUSTICE PETTIFOG.

"If the poor defendant has an offset, he makes him sue it, so that it grinds a grist both ways for him, like the upper and nether millstone."

Why perpetrate in Federal equity practice this antiquated injustice?

EVERETT P. WHEELER,
ROSCOE POUND,
FRANK IRVINE,
(For American Bar Association).

The CHAIRMAN. If there are no other gentlemen desiring to be heard, the committee will now adjourn.

Mr. DODDS. In connection with H. R. 16460, section 274A, as proposed does not in any wise state or make provision for delay or continuance in case of changes that might be allowed?

The CHAIRMAN. Yes.

Mr. DODDS. It seems to me that section should make provision.

The CHAIRMAN. Would you not think that under the rules of the court that the court would have discretion?

Mr. DODDS. It may have, but it seems to me it ought to be compulsory.

The CHAIRMAN. The bill which I introduced last summer, and which I have reintroduced at this session, known as H. R. 18236, does specially provide that whenever a cause is to be transferred from one docket to the other that then the terms may be indorsed by the court—that is, as to cause, and so forth—and I think whichever one of these bills we will bring out ought to preserve that idea perhaps better than to leave it as a matter of inference.

Mr. DODDS. I think it ought to make the terms compulsory.

The CHAIRMAN. We invite your attention to the criticism just advanced by Mr. Dodds.

Mr. WHEELER. It seems to me, Mr. Chairman and gentlemen, that these two bills might very well be united. Now, the section of bill 12365——

The CHAIRMAN. Now known as 18236.

Mr. WHEELER. That possibly is not covered by the bar association bill, and I see no reason why that should not be added to the bar association bill as an additional section, and that the clause which you have in the first clause of your bill, "upon certain terms that the court may impose," would be suitable to add to the first section of our bill. Then the second section of 18236 could be added on the same subject and be perfectly harmonious.

Mr. FAULKNER. H. R. 18236 seems not to be touched upon by your bill, and it ought to be the law.

Mr. WHEELER. It ought to be the law, certainly.

Mr. FAULKNER. That is where diverse citizenship is effectively urged, and whenever that point is raised, and even in the appellate court, it is permitted to be sufficiently alleged.

Mr. WHEELER. I knew a case, Mr. Chairman, where a party designedly did not take that objection in the court below, but raised it for the first time in the Supreme Court, and they felt obliged under the law that it should be reversed on the ground of jurisdiction—gross piece of injustice, probably necessary under the law. These bills would relieve that entirely, and our committee would certainly favor that strongly.

The CHAIRMAN. Without objection, the committee will stand adjourned.

Thereupon, at 12 o'clock m., the committee adjourned.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 13, 1912.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

Representative Burton L. French, of Idaho, appeared and made a statement relative to H. R. 16459, H. R. 16808, and H. R. 17249.

H. R. 16808 and H. R. 17249, not previously printed in this record, are as follows:

[H. R. 16808, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 4, 1912.

Mr. Lenroot introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and thirty-seven of "An act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby amended so as to read as follows:

"SEC. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

[H. R. 17249, Sixty-second Congress, second session.]

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 8, 1912.

Mr. French introduced the following bill; which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL To amend section two hundred and thirty-seven of an act to codify, revise, and amend the laws relating to the judiciary.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a final judgment or decree in any suit in the highest court of a State in which a decision in a suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States or where is drawn in question the validity of the statute of or an authority exercised under any State, on the ground of either being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or under treaty or statute of or commission held or authority exercised under the United States, may be reexamined or reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

STATEMENT OF REPRESENTATIVE BURTON L. FRENCH, OF IDAHO.

Mr. FRENCH. Mr. Chairman, the bill introduced by you and the other bills all propose an amendment to section 237 of the judiciary code, and have to do with the matter of appeal in certain cases from decisions from the State courts to the Supreme Court of the United States.

Under our present system section 237 of the judiciary act provides for an appeal to the Supreme Court of the United States from a State court—

First. In cases in which a decision affects the question of validity of a treaty or statute of or authority exercised under the United States, and the decision is against their validity.

Second. Where there is drawn into question the validity of a statute of or authority exercised under the State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision sustains the State law.

Third. Where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against their validity.

Probably I should say that the bill of Representative Lenroot (H. R. 16808) seeks to modify the present statute, so as to provide for an appeal to the Supreme Court of the United States in the second class alone; that is, in cases where is drawn into question the validity of the statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States.

The bills of Representative Clayton and myself go further than that, and provide that an appeal shall lie, irrespective of the decision, where is drawn in question the validity of a treaty or statute of or

an authority exercised under the United States, or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States.

The gist of the matter that I would be glad to modify is included in the bill as introduced by Representative Lenroot. However, I see no reason why a similar appeal should not lie to the Supreme Court of the United States in cases referred to in the bills of Mr. Clayton and myself.

So far as I am concerned, I shall be glad to urge the passage of either bill, and I would say to the committee that I was not aware that Mr. Clayton or Mr. Lenroot had introduced a bill on the subject until after I had prepared and introduced the bill touching this section.

About one year ago I had occasion to be very deeply interested in the question that is referred to in these several bills.

The Supreme Court of the United States, in the case of Lockner *v.* New York (198 U. S., 45), held that the New York statute was invalid under which the State of New York sought to limit the number of hours of labor of employees in bakeries to not more than 60 hours per week or 10 hours per day, the Court of Appeals of New York having previously sustained the statute.

In the case of Muller *v.* Oregon (208 U. S., 412), the Supreme Court of the United States sustained the Supreme Court of Oregon upon the validity of a statute which limited the hours of employment of women in laundries to not more than 60 hours per week.

It is true that these two cases are not identical, and yet they are very similar. However, following the decision in the Lockner case, the Court of Appeals of New York in the case of State *v.* Williams (189 N. Y., p. 131) declared the State statute invalid which forbade night labor by women.

This latter case, it would seem, is closely parallel to the Muller *v.* Oregon case, which was sustained by the Supreme Court of the United States. Yet, under our present statute, there is no way by which an appeal may be taken from the decision of the Court of Appeals of New York to the Supreme Court of the United States.

If the decision had upheld the State law, of course an appeal could have been taken and the matter reviewed by the United States Supreme Court. The State court in the Williams case undoubtedly relied much upon the decision of the Supreme Court of the United States in the case of State *v.* Lockner.

So much for these particular cases. Probably during the next few years, as never before, the various States will enact legislation looking to the solution of various economic problems. It is important that this legislation should be harmonious, and it is important that all States may know within the earliest possible time what provisions of law will be sustained by the Supreme Court of the United States.

It has been suggested that the amendments which I advocate would to some extent minimize the prerogatives of the States. However, I can not agree with this criticism. The bills to which I have referred would provide an appeal to the Supreme Court of the United States, no matter what the decision of the State court, so long as it involved the question arising under the Federal Constitution, laws, or treaties.

At present there is that right to appeal whenever the decision of the State court is adverse to the Federal contention; otherwise not.

It is altogether probable that at some time, from some State, the particular questions disposed of by the Court of Appeals of the State of New York in the Williams case will be reviewed by the Supreme Court of the United States.

Why should we wait until an appeal shall be taken from the supreme court of some State that, having enacted a similar law, has sustained its validity? Why not let the appeal go at once from the Court of Appeals of the State of New York? As I see it, our present statute merely means delay, and does not, in fact, conserve to the State any prerogative.

It is not my purpose to detain the committee at any further length upon this subject, other than to ask that there be printed as a part of the hearings upon this question a paper prepared by Prof. W. F. Dodd, and which was published in the December number of the Illinois Law Review. Prof. Dodd is assistant professor of political science in the University of Illinois, and his paper is most illuminating upon this subject.

In talking with Prof. Dodd last summer he told me of his interest in this subject, and I urged him to prepare a statement or paper upon the question setting forth his views. I am sure that the committee and the Members of Congress or those who may be interested will find his discussion of exceedingly great value in connection with this subject:

The United States Supreme Court as the Final Interpreter of the Federal Constitution.[1]

[By W. F. Dodd, assistant professor of the University of Illinois.]

In every governmental organization where there exist both a central legislature and legislatures for subordinate territorial divisions—and particularly in countries organized under a federal system—there must be somewhere power to prevent encroachments by the local legislatures upon the powers of the central legislature. In strict theory, encroachments upon the powers reserved to the local bodies should be guarded against as carefully as encroachments by these local bodies upon the powers of the central legislature. But if a central government under a federal organization is to exercise its powers effectively, it, in any case, must have authority to prevent the states from exercising powers which conflict with its own. As a practical proposition, the National Government in the United States must be able to maintain its supremacy when the States seek to exercise powers which have been conferred upon the National Government. In theory the States should be equally as free to maintain their supremacy in the fields reserved to them, but in the absence of some organ independent of both state and central governments which might decide questions of conflict, it has been usual in all modern federal governments to entrust the decision of such questions to some organ or organs of the central government. In this way a decision of the question in conflict is obtained and the supremacy of Federal law over that of the component States is maintained, but the deciding body is one apt to be more tender of the powers of the Federal Government than of the reserved powers of the States.[2]

A number of the members of the Federal convention of 1787 clearly perceived that if the new Government were to be an effective one, it should possess, through some one of its organs, power to annul conflicting State laws, and proposals were repeatedly urged which should expressly confer such a power upon the National Legislature, upon the courts, or upon a council of revision composed of the Executive acting with "a

[1] Reprinted from the December number of the Illinois Law Review.

[2] In subordinate federal organizations, such as Canada and Australia, power may be vested in an independent organ of the British Imperial Government to preserve a balance between State and federal powers, and the judicial committee of the English privy council actually exercises such power to a certain extent.

convenient number of the national judiciary."[1] Such proposals were rejected, and the only express provision of the Federal Constitution which seeks to establish the supremacy of the Federal Constitution and laws is the one which provides that—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."[2]

But it was quite clear that the National Government could not be effective if its powers were subject to conflicting interpretations by courts in 13 separate States, with the interpretation of the Federal Constitution and laws by the highest court of any State final and conclusive within the borders of that State. And in the third article of the Constitution it had been broadly declared that—

"The judicial power shall extend to all cases, both in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

And after enumerating the cases in which the Supreme Court should have original jurisdiction, it was provided that—

"In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."[3]

These provisions were assumed by many of the farmers of the Constitution to authorize the review of State decisions upon Federal questions by the Supreme Court of the United States, and no constitutional objections seem to have been raised in 1789 to the passage of that section of the Federal judiciary act which provided for the review of such State decisions. Not until later was the question of constitutional power raised, and it was effectually set at rest by the decisions of the United States Supreme Court in Martin *v.* Hunter's Lessee (1816) and Cohen *v.* Virginia (1821).[4]

Section 25 of the Federal judiciary act of 1789 was repealed and reenacted with some changes in 1867, this revised form being substantially incorporated in the United States Revised Statutes as section 709. Somewhat amended again in 1875, the section now forms section 237 of the new Federal Judicial Code and reads as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the right, title, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."[5]

A writ of error from the United States Supreme Court to the highest State court is given only where the decision in the State court is against the Federal right set up. Where the State decision sustains the Federal right, it is final and conclusive, and, in such a case, the State court is the final interpreter of the Federal Constitution and laws. The purpose of the Federal review was twofold: (1) To safeguard the powers of the United States, and (2) to safeguard the rights which individuals might claim under the Constitution, statutes, or authority of the United States.

The first of these purposes was well stated by Chief Justice Taney in Commonwealth Bank of Kentucky *v.* Griffith:

"The power given to the Supreme Court by this act of Congress was intended to protect the General Government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right

---

[1] Hamilton's proposal that State governors should be appointed by the Federal Executive sought to accomplish the same purpose.

[2] Art. VI, clause 2.

[3] Art. III, sec. 2.

[4] 1 Wheat., 304; 6 Wheat., 264. W. E. Dodd, Chief Justice Marshall and Virginia, 1813-1821, American Historical Review, XII, 776.

[5] 36 U. S. Statutes at Large, 1156 (Mar. 3, 1911).

was therefore given to this court to reexamine the judgments of the State courts, where the relative powers of the General and State Governments had been in controvesry, and the decision had been in favor of the latter. It may have been apprehended that the judicial tribunals of the States would incline to the support of State authority against that of the General Government; and might, moreover, in different States give different judgments upon the relative powers of the two Governments, so as to produce irregularity and disorder in the administration of the General Government. But when, as in the case before us, the State authority or State statute is decided to be unconstitutional and void in the State tribunal, it can not, under that decision, come in collision with the authority of the General Government; and the right to reexamine it here is not necessary to protect this Government in the exercise of its rightful powers. In such a case, therefore, the writ of error is not given." [1]

The power of reviewing State decisions granted by the judicial code is sufficient to prevent encroachments by the States upon the powers properly belonging to the Federal Government, and such was its primary purpose. As to the other purpose of review, that of safeguarding rights which may be claimed under the Constitution of the United States, the best statement is that made by Justice Story in Martin *v.* Hunter's Lessee:

"The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights or assert their privileges before the same forum. Yet, if the construction contended for be correct, it will follow that as the plaintiff may always elect the State court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty we are referred to the power which it is admitted Congress possessed to remove suits from State courts to the national courts." [2]

To what extent does the Federal judicial code permit a final decision by the United States Supreme Court of claims of private right which may involve questions of Federal constitutional law? If a Federal question is set up in the State court and the decision of the State court upholds the Federal right set up, it is quite clear that there is no review by the United States Supreme Court,[3] although one of the parties to the suit in the State court is injured by such holding—the party against whom the Federal question is set up has no right to a final decision of this question by the highest Federal court, although he may be as much interested and his rights as much affected as is the other party. He may, perhaps, avoid this difficulty in some cases by bringing his action in an inferior Federal court, but usually he has not even this recourse, because if the action is a criminal action under a State law or an effort to enforce rights under such a law it must ordinarily be brought in the State court. To take a specific illustration, in the recent case of Ives *v.* South Buffalo Railway Co.,[4] Ives sought to recover compensation from the railway company under the New York compulsory workmen's compensation law, and this law was held invalid, in part as a violation of the Federal Constitution. Clearly, there were here three parties in interest: Ives, who desired to obtain compensation; the railway company, which desired to avoid payment of compensation; and the State, which desires a final determination as to whether an important policy which it has sought to inaugurate is in conflict with the Federal Constitution. Yet the railway company, had the decision gone against it in the State court, would have had a right of review by the United States Supreme Court. The State decision, however, was in favor of the Federal Constitutional right set up by the railway company, and this decision is final and conclusive upon Ives and upon the State. From what has been said above, it must appear that the review granted by the terms of the Federal judicial code does not permit a final decision of the Federal question by the United States Supreme Court (1) where an individual asserts a right under a State statute which is held by the highest State court to be a violation of the Federal Constitution and (2) where the powers of a State and the interests of its citizens may be affected by the decision of a State court that a State law violates the Federal Constitution.

When the Federal judiciary act was first framed, it was assumed that the State courts would be too liberal in upholding State laws attacked as violative of Federal rights; to quote Chief Justice Taney again, it was "apprehended that the judicial tribunals of

---

[1] 14 Peters, 56 (1840). See also Martin *v.* Hunter's Lessee, 1 Wheat., 304, 347, 348; Murdock *v.* Memphis, 20 Wall., 590, 631, 632; Missouri *v.* Andriano, 138 U. S., 496; Whitten *v.* Tomlinson, 160 U. S., 231, 238.

[2] 1 Wheat., 304, 348, 349.

[3] Murdock *v.* Memphis, 20 Wall., 590, 631-632.

[4] 201 N. Y., 271 (1911).

the State would incline to the support of the State authority against the Federal Government," and there was thought to be need only of checking State encroachments on Federal power in this way, not of protecting the States themselves from State courts which might enforce Federal limitations more strictly than the United States Supreme Court itself. The condition assumed by Chief Justice Taney quite clearly existed until well into the nineteenth century, and probably until the freer use within recent years of the judicial power to annul legislation. But now we find that conditions have changed and that the States and their citizens really need the protection of the United States Supreme Court against the strict, and often illiberal, decisions of their own courts on Federal questions.

A State decision adverse to a State enactment on Federal grounds is final under the provisions of the Federal judicial code. On this account the State courts should resolve every doubt in favor of a State enactment in such case, and in this way permit a final decision of the question of Federal constitutional law by the highest Federal court. Prof. Thayer stated very clearly the rule which should be followed by State courts in such cases:

"As to how the State judiciary should treat a question of the conformity of an act of their own legislature to the paramount Constitution, it has been plausibly said that they should be governed by the same rule that the Federal courts would apply. Since an appeal lies to the Federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the judiciary act an appeal does not lie from every decision; it only lies when the State law is sustained below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissible view which the coordinate legislature has adopted. At any rate, under existing legislation it seems proper in the State court to do this, for the practical reason that it is necessary in order to preserve the right of appeal."[1]

Until recent years State courts seem to have followed the rule laid down by Prof. Thayer and to have taken a view favorable to State powers when such powers were questioned on Federal grounds. The strict attitude of the State courts has developed since the Supreme Court of the United States acquired, under the fourteenth amendment, a wide control over State legislation. This attitude may be said to be due in part (1) to the narrower outlook of many of the State courts as compared with the Federal Supreme Court, and (2) to the narrow view which the Supreme Court of the United States has taken in many cases, and to the doubt upon the part of State courts as to just how liberal they may dare to be. No court likes to be overruled on appeal, and a State court, in case of doubt, may often prefer to decide against a State law, thus settling the question finally, rather than to decide in favor of the law and run the risk of being overruled on appeal by the Supreme Court of the United States. State courts can not go beyond the United States Supreme Court in liberality toward State enactments, and this almost necessarily means that they will be too cautious in order to avoid decisions which may later be overruled on appeal.[2]

Under the terms of the judicial code State courts are, therefore, free to construe the Federal Constitution as they please, so long as they exercise their power to invalidate rather than to sustain State enactments. Some illustrations will indicate more clearly the present situation.

In State ex rel. Johnson *v.* Chicago, Burlington & Quincy Railroad Co.[3] there was under consideration a validly adopted State constitutional amendment, permitting counties and townships to levy a special road and bridge tax, but from the provisions of the amendment were excepted the cities of St. Louis, Kansas City, and St. Joseph. The court held this amendment invalid as a deprivation of "equal protection of the laws" under the Federal Constitution, on the ground that it was a discrimination in favor of the excepted cities as against other parts of the State, and this, although other parts of the State were permitted, not required, to levy the tax. It is unthinkable to suppose that the amendment here under discussion would have been held invalid by the Federal Supreme Court on the Federal grounds assigned by the State court for its decision.

The New York Court of Appeals in People ex rel. Rodgers *v.* Coler,[4] and in People *v.* Orange County Road Construction Co.,[5] held invalid a State law regulating hours and conditions of labor on State and municipal public works, the court in the latter case saying, through Judge Cullen, that:

"The question is settled by the decisions both of this court and the Supreme Court of the United States."

---

[1] Thayer, Legal Essays, 37–38.

[2] Some of the matter in the succeeding pages is taken from my book on the Revision and Amendment of State Constitutions, pp. 244–258.

[3] 195 Mo., 228 (1906).

[4] 166 N. Y. 1 (1901).

[5] 175 N. Y. 84 (1903).

About seven months after this utterance Justice Harlan, speaking for the Supreme Court of the United States upon a similar Kansas statute, said, upon the question raised as to its agreement with the Federal Constitution:

"Indeed its constitutionality is beyond all question." [1]

The Supreme Court of Utah in 1904 and the Court of Appeals of New York in 1905 declared invalid, as violating both the State and Federal Constitutions, State statutes restricting sales of stocks of merchandise in bulk, Judge Werner for the New York court saying:

"No one will have the temerity to suggest that this drastic and cumbersome statute is not a restraint of the rights of 'liberty' and 'property' as these terms have been judicially declared to have been used in the Federal and State Constitutions." [2]

The Supreme Court of the United States had the "temerity" in 1910 to hold that an almost identical law was not a violation of the Federal Constitution.[3]

The New York Court of Appeals in the case of State *v.* Lochner [4] took a very liberal attitude toward legislation regulating hours of labor in bakeries and upheld the legislation, but was overruled by the Supreme Court of the United States in Lochner *v.* New York.[5] In the later case of State *v.* Williams,[6] the State court, seeking to profit by its previous experience, took a very strict view and annulled State legislation forbidding night labor by women. The State court in this case took the ground that there was no constitutional warrant for making a discrimination between men and women, while the Federal Supreme Court in Muller *v.* Oregon,[7] decided but a short time afterwards, took a different view and sustained a law limiting the labor of women to 10 hours. The argument adopted by the Federal court would probably also have sustained the New York statute, but the State decision in New York was final under the terms of the Federal judiciary act.

The Illinois Supreme Court in the case of Ritchie *v.* People[8] held invalid a State law limiting the labor of women to eight hours a day in factories and workshops. A law of this sort pretty clearly would not have been upheld by the United States Supreme Court in 1895, and it is doubtful if it would be upheld to-day, but the vice of this Illinois decision is that it took such a strict position against any legislation applicable simply to women as to prevent or rather discourage such legislation in Illinois for about 14 years. After the liberal position taken by the United States Supreme Court in Muller *v.* Oregon (1908) the Illinois Legislature was, in 1909, induced to pass a law limiting to 10 hours the labor of women in mechanical establishments, factories, and laundries. This law was then sustained by the State court, which distinguished its decision from that of 1895, but the point of view of the two decisions is fundamentally different.[9]

The recent case of Ives *v.* South Buffalo Railway Co.[10] presents clearly some of the difficulties of the present situation. A compulsory workmen's compensation law has been declared invalid as a violation of the "due process of law" clauses of the Federal and State constitutions, whereas many persons think that the law would have been upheld by the United States Supreme Court as not a violation of the Federal Constitution. As suggested below, if the Federal question were out of the way, it would be possible by a constitutional amendment to overcome the opposition of the State court on State constitutional grounds, but under present conditions the State decision on the question of Federal constitutional law is final.

Of course the question will probably in time come to the United States Supreme Court. A compulsory workmen's compensation law has been enacted in Washington, and the recent New Jersey statute on the same subject has features which may be considered compulsory. Should either of these laws be upheld by the State courts, the matter may in the near future reach the Federal Supreme Court.[11] But should the State decisions be unfavorable, an immediate settlement of the question is impossible, although some one State court may finally be found which would sustain such a law

---

[1] Atkin *v.* Kansas, 191 U. S. 207 (1903). After the Federal decision the State statute was again declared invalid as a violation of the State constitution, and the State court was overruled by a constitutional amendment of 1905. People ex rel. Cossey *v.* Grout, 179 N. Y. 417.

[2] Block *v.* Griff, 27 Utah 387 (1904). Wright *v.* Hart, 182 N. Y. 330 (1905). The Indiana statute held invalid in McKinster *v.* Sager, 163 Ind. 671 (1904), was in terms discriminatory and was for this reason properly held an impairment of Federal constitutional rights. The New York appelate division held valid in 1908 an amended bulk sales law. Sprintz *v.* Saxton, 126 App Div. 421.

[3] Kidd *v.* Musselman, 217 U. S. 461. See also Lemieux *v.* Young, 211 U. S. 489.

[4] 177 N. Y. 145.

[5] 198 U. S. 45.

[6] 189 N. Y. 131 (1907).

[7] 208 U. S. 412 (1908).

[8] 155 Ill. 98 (1895).

[9] Ritchie *v.* Wayman, 244 Ill. 509 (1910). For other Illinois cases of this character see a note by Prof. Henry Schofield in 3 Illinois Law Review 393.

[10] 201 N. Y., 271 (1911).

[11] The Washington law was upheld by the State supreme court in the case of State ex rel. Davis-Smith Co. *v.* Clausen, 117 Pac., 1101 (Sept. 27, 1911).

and thus permit a final decision of the Federal question by the highest Federal court.[1] This process may take 10 years, and in the meantime the States are left in uncertainty as to their powers. They are, it would seem, entitled to know more promptly whether they have or have not power under the Federal constitution to establish a system of compulsory workmen's compensation or to exercise any other power which may be contested.[2]

But to what extent are the States at liberty to proceed to exercise the contested power, even after a final decision upon the Federal question has been obtained? Where the Federal Supreme Court has spoken, the State courts are in legal theory bound to follow it in their interpretation of the Federal Constitution, but there is no way in which this duty may be enforced in favor to State enactments, because no appeal lies to the United States Supreme Court if State enactments are declared invalid by the State court. In fact, State courts do not always follow the Federal Supreme Court in their interpretation of the provisions of the Federal Constitution. Then, too, no two acts are apt to be precisely alike, and a State court may plausibly hold an enactment invalid on Federal grounds if it varies in the slightest degree from a similar enactment upheld by the United States Supreme Court.

Over against the legal theory that State courts must follow the Supreme Court of the United States in their interpretation of the Federal Constitution, it may be well to place a recent statement of one of our most eminent State judges. The Supreme Court of Iowa had held invalid as an interference with interstate commerce a State statute prohibiting any person from soliciting, taking, or accepting "any order for the purchase, sale, shipment, or delivery of any liquors." After the decision of Delamater *v.* South Dakota[3] by the Supreme Court of the United States, it was contended that the statute was not a violation of the Federal Constitution as interpreted by the United States Supreme Court, and the State court, following the Federal decision, held the statute valid. But Judge McClain, in rendering the opinion of the court, used the following language:

"We are of course not bound to follow the views of the Supreme Court of the United States in passing upon the validity of our statutes further than that we recognize our obligation not to enforce a statute which is in violation of the Constitution of the United States. We are not bound, therefore, by any obligation imposed upon us in the Federal Constitution to uphold a State statute merely because, in the view of the Supreme Court of the United States, it is not unconstitutional. But on the other hand, when we have held a State statute to be unconstitutional because in supposed conflict with the Constitution of the United States, and the Supreme Court of the United States has so interpreted the Federal Constitution that the supposed conflict is found not to exist, there is no good reason why we should not change our ruling so as to sustain the policy of the statutes of the State." [4]

Prof. Schofield has stated the situation clearly:

"De facto the highest courts of the several States are, within the borders of their respective States, ultimate judicial expounders of the Constitution and laws of the United States, and as such they have the de facto, though not the de jure, power to shut their eyes to, refuse to follow, and go directly against decisions of the Federal Supreme Court expounding the Constitution and laws of the United States, subject to this important limitation, however, namely: That in the exercise of this de facto power, the courts of the several States confine their activity to pressing the screws of the limitations of the Constitution and laws of the United States down on to their respective States tighter than the Federal Supreme Court does."[5]

State courts are therefore in practice now free to construe the Federal Constitution as they please, so long as they exercise this power to invalidate rather than to sustain State enactments. They have absolute and final power to annul any State enactment on any Federal ground which they may assign. For example, in the recent case of Jordan *v.* State[6] the Texas court of criminal appeals held invalid, as a violation of the State and Federal Constitutions, a State law which made it unlawful for any person, firm, association or corporation to pay laborers in checks or orders redeemable in goods or merchandise. The decision, based in large part on Federal grounds,

---

[1] Prof. Ernst Freund in the Survey, XXVI, 196 (Apr. 29, 1911).

[2] It may perhaps be suggested that in many cases it may be desirable in the interest of progressive measures to delay rather than to hasten a final decision by the United States Supreme Court—that a strict decision at first would retard development, while a more liberal opinion may be expected after a 10-year period of discussion and education. There may be something to this suggestion, but even at the first a more liberal opinion may perhaps be expected from the United States Supreme Court than from many State courts.

[3] 205 U. S., 93.

[4] McCollum *v.* McConaughy, 141 Iowa, 172 (1909).

[5] 3 Illinois Law Review 303.

[6] 51 Tex. Crim. App. Rep. 531 (1907).

entirely ignored the contrary holding in Knoxville Iron Company *v.* Harbison,[1] although discussing cases in which this decision had been summarized.

Summing up briefly the situation as to the review of State decisions by the United States Supreme Court, it may be said: (1) that individual rights involving a Federal question are not properly safeguarded, because the party who sets up the Federal question has a right of appeal if the decision goes against him, while the party against whom the Federal question is raised has no such right, although his interests may be equally affected; (2) a State, one of whose laws is contested as violating the Federal Constitution, has no way of obtaining from the United States Supreme Court a final settlement of the question should its own court decide against the validity of its law; (3) a uniform interpretation of the Federal Constitution is not obtained, because until a decision upon the particular question at issue is rendered by the United States Supreme Court, each State court is entirely free to interpret the Federal Constitution as it pleases, provided it employs its power to sustain Federal rights which may be claimed before it; and, even after a decision of the particular question is obtained from the United States Supreme Court, State courts still have the power to disregard such decision, so long as they interpret the United States Constitution and laws more strictly than does the highest Federal court.

This situation may, it seems, be remedied by an amendment to the present Section 237 of the Federal judicial code, so as to permit a review by the Supreme Court of the United States of State decisions involving Federal questions, irrespective of whether the decision of the State court sustained or denied the Federal right set up; that is, by striking out the italicized words in this section, as quoted on page 291. The more serious difficulties of the present situation may, in fact, be obviated simply by striking out the words "and the decision is in favor of their validity" from the phrase, "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity." The striking out of this clause would permit a final Federal decision in the most important series of cases in which such a decision is not now available, although many cases would remain in which a review by the United States Supreme Court would be desirable.

Three arguments will probably be offered in opposition to the above suggestion: (*a*) that such an amendment will increase Federal power, and correspondingly reduce the powers of the States; (*b*) that it will increase the work of the United States Supreme Court; (*c*) that the result aimed at would not be accomplished, because most State decisions holding State statutes invalid are based on both State and Federal constitutional grounds. It may be well to devote some attention to each of these arguments:

(*a*) The proposed amendment to the Federal judicial code does in fact enlarge the jurisdiction of the Supreme Court of the United States to review decisions of the highest State courts, and in this way diminishes to a certain extent the power of the State courts. But there can result from it no diminution of State powers as a whole, for the enlarged review would apply primarily where a State court has taken a narrow view of State powers, and would obtain a prompt determination as to whether a State legislature has, under the Federal Constitution, powers which the State court has alleged that it does not possess. No State court can at present take a more liberal view of State powers, under the Federal Constitution than does the United States Supreme Court, for, if it does, an appeal may be taken to the highest Federal court. It is only when a State court restrains State legislative powers under the Federal constitution that its decision is now final, and the State court in restraining State powers is itself limiting them. A right of appeal in such cases can result in only one of two conclusions: either (1) the United States Supreme Court will affirm the State decision, denying the power of the State legislature, but in no way diminishing the power conceded to the State legislature by the State court; or (2) the United States Supreme Court will reverse the State decision and declare that the State legislature possesses, under the Federal Constitution, powers which the State court has said that it did not possess. The only result is either to concede to the State legislature powers which before it could not exercise because of the State decision, or to determine finally that, under the Federal Constitution, the State has not a power already denied to it by the State court.

Let us illustrate again from the recent case of Ives *v.* South Buffalo Railway Co.,[2] where the New York court of appeals held a compulsory workmen's compensation law invalid as a violation of the "due process of law" clauses of the State and Federal Constitutions. At present, this decision is final on both State and Federal constitutional grounds. A right of appeal would permit a final determination as to whether the law is actually a violation of the Federal Constitution, and, if not, the State would

---

[1] 183 U. S. 13 (1901).

[2] 201 N. Y., 271 (1911).

be able to overcome the decision on State grounds by a State constitutional amendment and to exercise the disputed power. A Federal decision here could not further limit State powers; it might, and, perhaps would, remove a limitation placed upon State power by the State decision.

(*b*) It can not, of course, be definitely determined to what extent an enlarged right of review under the suggested amendment would increase the work of the United States Supreme Court, and it must be agreed that this court is already overburdened. Confining our discussion for the moment to cases in which the Federal court might, under such an amendment, review State decisions holding invalid a State authority or statute as violative of the Federal Constitution, treaties, or laws, it is difficult to see how the work of the United States Supreme Court would be materially, if at all, increased. The important difference will be that the question will come to that court more promptly. For example, the question as to the validity of a compulsory workmen's compensation law will almost certainly come before the highest Federal court at some time, for some State court will be found liberal enough to uphold such a State enactment on Federal grounds, and to permit a review by the United States Supreme Court under the terms of the present judicial code. The question must be passed upon at some time; under the present judicial code, such a decision may be postponed for 10 years—under the proposed enlargement of Federal review, it could be decided more promptly.

As to cases in State courts involving questions as to the "validity of a treaty or statute of, or an authority exercised under, the United States," a grant of review where the decision is in favor of, as well as where it is against, their validity, would probably not increase materially the work of the United States Supreme Court, and the same would probably be true as to State decisions where "any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States." If there is serious question as to the constitutionality of any power exercised or sought to be exercised under the authority of the United States, this question must sooner or later be presented to the United States Supreme Court, by virtue of an adverse State decision, or through a proceeding commenced in the inferior Federal courts. The result here also would probably be a prompter settlement of such questions, rather than a material increase in the number of cases presented to the Federal Supreme Court.

(*c*) In order to discover whether the amendment suggested above to the Federal Judicial Code would accomplish the purpose aimed at, we must discuss somewhat fully the extent to which the United States Supreme Court takes or declines jurisdiction in cases brought from State courts under the terms of the present law.

In perhaps the greater number of cases in which the United States Supreme Court is asked to review State decisions, the State decision sought to be reviewed involves both a Federal and a State question. Inasmuch as the United States Supreme Court confines itself to the review of the Federal question only, that court has uniformly declined to consider a State case on its merits if the decision of the State court might properly have been sustained on non-Federal grounds, even though a Federal question were also presented and decided in such a way as to give jurisdiction. The rule is stated as follows by Justice Bradley:

"Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." [1]

Section 25 of the Federal judiciary act of 1789 contained the clause: "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record and immediately respects the beforementioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." This clause was omitted in 1867, and in the case of Murdock *v.* Memphis [2] the contention was advanced that this omission left all questions raised in the State court open to review by the United States Supreme Court on writ of error. Justice Bradley, in a dissenting opinion, contended

[1] Klinger v. Missouri, 17 Wall., 257 (1872).

[2] 20 Wall., 590 (1875).

that all questions, either State or Federal, should be reviewed by the writ of error, and a somewhat similar position was taken by Justices Clifford and Swayne; under these views, the Federal question should have been reviewed, irrespective of whether there was adequate non-Federal ground for the decision of the State court. But a majority of the court took the opposite view and Justice Miller, in rendering the decision, said:

"But when we find that the State court has decided the Federal question erroneously then, to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the Federal question alone is sufficient to dispose of the case, or to require its reversal; or, on the other hand, whether there exist other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question. In the latter case the court would not be justified in reversing the judgment of the State court. * * *

"If it [judgment of State court involving Federal question] erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

"But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered or remand the case to that court, as the circumstances of the case may require." [1]

In order to indicate clearly the operation of this rule, it will be well to discuss several cases in which it has been applied by the United States Supreme Court. In the case of Giles *v.* Teasley,[2] Giles alleged that the provisions of the Alabama constitution of 1901, with respect to registration and voting, were a violation of the fifteenth amendment, and brought actions in the State courts—one to recover damages against the board of registrars of Montgomery County because of their refusal to register him as a qualified voter, and the other for a mandamus to compel his registration as a qualified voter. On demurrer, both suits were dismissed by the State courts, and writs of error were sought to the United States Supreme Court. The writs of error were dismissed because the United States Supreme Court thought there was sufficient non-Federal ground to sustain the State decision. This position was, perhaps, not open to question as far as concerns the application for mandamus, for Giles, himself contesting the legality of the registration board, could not, as the State court said, have mandamus to compel action by a body which he alleged to be unlawful. As to the action for damages, the position of the United States Supreme Court will sufficiently appear from a statement in the opinion of the court, as rendered by Justice Day:

"The first ground of sustaining the demurrer is, in effect, that, conceding the allegations of the petition to be true, and the registrars to have been appointed and qualified under a constitution which had for its purpose to prevent negroes from voting and to exclude them from registration for that purpose, no damage has been suffered by the plaintiff, because no refusal to register by a board thus constituted in defiance of the Federal Constitution could have the effect to disqualify a legal voter, otherwise entitled to exercise the elective franchise. In such a decision, no right, immunity, or privilege, the creation of Federal authority, has been set up by the plaintiff in error and denied in such wise as to give this court the right to review the State decision. In the ground first stated we are of the opinion that the State court decided the case for reasons independent of the Federal right claimed, and hence its action is not reviewable here."

The State court assuming, simply for the purpose of argument, that the State provisions were invalid, said, in effect, that an interference with a Federal right under an unconstitutional State enactment is not an interference with a Federal right, and the United States Supreme Court said that this constituted a sufficient non-Federal ground to sustain the decision. The Federal court overlooked entirely the fact that Giles had been deprived of an alleged Federal right under color of State authority

[1] 20 Wall., 635, 636. Chief Justice Waite took no part in this decision. *See also* Eustis *v.* Bolles, 150 U. S. 361 (1893).

[2] 193 U. S., 146 (1904).

and that the State court had decided against him. This question was clearly a Federal question which formed the whole ground of the State decision with respect to the action for damages. The argument adopted by the United States Supreme Court would permit it to avoid the review of any Federal question presented.

The recent case of Berea College *v.* Kentucky [1] presents another illustration of what the United States Supreme Court considers a sufficient non-Federal ground to sustain a State decision without making necessary a review of the Federal question. In this case there was involved a Kentucky statute making it unlawful for "any person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction." Berea College contested the validity of this statute as a deprivation of "due process of law" under the fourteenth amendment; the statute was sustained by the State court, and the case was brought to the United States Supreme Court on writ of error. The United States Supreme Court, in an opinion rendered by Justice Brewer, declined to consider the Federal question raised, but affirmed the State decision on the ground that the State law might properly be considered an amendment to the corporate charter of Berea College, and that this presented a sufficient non-Federal ground to support the decision of the State court. Justice Harlan's dissenting opinion seems more satisfactory, in its view that the State statute was not separable so as to be applied to corporations only, and that the case fairly raised the Federal question as to whether it is "due process of law" to forbid the coeducation of whites and negroes.

But the cases of Giles *v.* Teasley and Berea College *v.* Kentucky involved questions as to the social and political rights of negroes, subjects upon which the United States Supreme Court has uniformly shown itself loath to pass. The case of Steamboat Navigation Co. *v.* Reybold [2] may also throw some light on what is regarded as a sufficient non-Federal question to sustain a State decision. Reybold, in violation of a Federal statute, obtained an assignment from the steamboat company of a claim which it had against the United States, and through Reybold's efforts the claim was collected and paid to the company. He then sued to recover the money on two counts: (1) For money had and received and (2) on a quantum meruit, for work and labor performed. The lower court charged in favor of Reybold on both counts, and the jury returned a verdict for Reybold, but for a sum slightly less than that collected from the United States. This judgment was affirmed by the highest State court and the case brought to the United States Supreme Court on writ of error. This court, speaking through Justice Lamar, held that the non-Federal ground of quantum meruit was sufficient to sustain the judgment; and that the case, therefore, did not necessarily involve any question under the Federal statute forbidding the assignment of claims. The court overlooked the fact that Reybold recovered substantially the whole amount which he might have recovered had the assignment of the claim been valid, and that the position taken in this case would permit a complete evasion of the purpose of the Federal statute.

The bearing of the above discussion upon the subject here under consideration will be appreciated when it is suggested that State decisions declaring State laws invalid are frequently, perhaps usually, based on both State and Federal constitutional grounds. Practically all the State constitutions contain guaranties substantially equivalent to that of the fourteenth amendment, "that no person shall be deprived of life, liberty, or property without due process of law." Now, the State courts are the final judicial interpreters of their State constitutions, and "due process of law" in any State constitution means what the court of that particular State interprets it to mean.

Under these conditions it is perhaps not surprising to find that "due process of law" often means one thing in one State and another thing in some other State, and that it means something still different as interpreted by the Supreme Court of the United States. Under State constitutional provisions identical with, or substantially equivalent to, those in the fourteenth amendment, State courts have frequently annulled legislation when similar legislation has been upheld by the United States Supreme Court.

So, in Colorado an eight-hour day for mines and smelters was held to be a violation of the State constitution, although upheld by the United States Supreme Court as not violative of the Federal Constitution.[3] Under the Federal "due process of law" clause it is not unlawful to forbid payment of wages in store orders not redeemable in cash, but under a practically identical clause in Missouri such action is unlawful.[4] Under the Constitution of the United States it is not improper to require that coal be

---

[1] 211 U. S., 45 (1908).
[2] 142 U. S., 636 (1892).
[3] Holden *v.* Hardy, 160 U. S., 366 (1898); in re Morgan, 26 Colo., 415 (1899).
[4] Knoxville Iron Co. *v.* Harbison, 183 U. S. (1901); State *v.* Missouri Tie & Timber Co., 181 Mo., 536 (1904)

weighed before screening in order to determine the wages of miners, but under similar State constitutional provisions such legislation is invalid in Illinois, Ohio, and Pennsylvania.[1] Laws placing limitation upon the sale of stocks of merchandise in bulk are not violative of the "due process of law" clause of the Federal Constitution as interpreted by the United States Supreme Court, but do violate similar provisions in the State constitutions of Ohio and Illinois.[2] A law regulating hours and conditions of labor on State and municipal public works in New York was at first held invalid as violating both the State and Federal Constitutions; a decision of the United States Supreme Court then held such a law not violative of the Federal Constitution, and a subsequent decision of the New York Court of Appeals declared the same statute invalid as a violation of the State constitution; and the Supreme Court of Ohio also holds similar legislation to be violative of state constitutional provisions not dissimilar from those in the fourteenth amendment.[3]

In some States, as, for example, in Illinois, decisions as to "due process" and the "equal protection of the laws" are usually based on the State constitutional provisions alone, and results are reached which limit State legislative action to a much greater extent than would the similar Federal clauses as interpreted by the United States Supreme Court.[4] Since the fourteenth amendment has placed private rights under the protection of the Federal Constitution, the power of State courts to annul legislation on State "due process" and "equal protection of the laws" clauses has ceased to be of any advantage for the protection of private rights. The power of State courts, on the basis of such State provisions to annul State enactments. may under present conditions be likened to a fifth wheel on the governmental coach. Such State constitutional provisions and State decisions based upon them perform no useful function in protecting individual rights; they simply serve to retard a final and uniform settlement of questions of public policy in so far as they are dependent upon constitutional construction. A conservative or reactionary State court may, under present conditions, block for a while legislation approved by other State courts and by the United States Supreme Court, but even though such action may at times prove of advantage, the advantage is much more than offset by the distrust of the courts resulting from it.

But under the present situation we have both Federal and State constitutional guaranties as to "due process of law" and "equal protection of the laws," and a State court, in declaring a State law invalid, may base its decision upon both of these guaranties or upon either of them. If a State court bases its decision on a State constitutional provision alone, such decision may be overcome by a State constitutional amendment, if the people are sufficiently interested to do this, and the power denied by the State court as a violation of the State constitution may be placed in the State constitution itself; such a proceeding was resorted to in Colorado to overcome the decision In re Morgan, and in New York to overcome decisions in that State with respect to labor on public works,[5] and action of this sort is possible in all States except those whose constitutions, as in Illinois, are practically unamendable.

Under present conditions if a State court held a statute invalid as a violation of the State constitution or as a violation of both State and Federal constitutions, the people of the State may overcome the court's State grounds by a constitutional amendment, but the State court may then hold the State constitutional amendment invalid as a violation of the Federal Constitution, and such decision is final.[6] So that, by its State constitutional amendment, no advance would have been made. If a State court declares a State statute invalid on Federal grounds alone, such a decision, as has already been suggested, is not now open to review by the United States Supreme

---

[1] McLean *v.* Arkansas, 211 U. S., 539 (1909); Millet *v.* People, 117 Ill., 294 (1886); Ramsey *v.* People, 142 Ill., 380 (1892); Harding *v.* People, 160 Ill., 459 (1896); In re Preston, 63 Ohio St., 428 (1900); Commonwealth *v.* Brown, 8 Pa., Super. Ct., 339 (1897). The Ohio case appears to be in part based on the Federal Constitution, as was also the Colorado advisory opinion, In re House bill No. 203, 21 Colo., 27 (1895). It should be noted that these State decisions antedate by a number of years the decision of the United States Supreme Court. The statute involved in Harding *v.* People, 160 Ill., 459, was discriminatory, but perhaps no more so than that involved in McLean *v.* Arkansas.

[2] Lemieux *v.* Young, 211 U. S., 489 (1909); Kidd *v.* Musselman, 217 U. S., 461 (1910); Miller *v.* Crawford, 70 Ohio St., 207 (1904); Off *v.* Morehead, 235 Ill., 40 (1908). The Ohio statute, however, was stricter than those upheld by the United States Supreme Court.

[3] People ex rel. Rodgers *v.* Coler, 166 N. Y., 1 (1901); People *v.* Orange County Road Construction Co7 175 N. Y., 84 (1903); Atkin *v.* Kansas, 191 U. S., 207 (1903); People ex rel. Cossey *v.* Grout, 179 N. Y., 4 ' (1904); Cleveland *v.* Clements Bros. Construction Co., 67 Ohio St., 197 (1902).

[4] See Starne *v.* People, 222 Ill., 189 (1906), and Massie *v.* Cessna, 239 Ill., 352 (1909).

[5] For other cases of this character see my Revision and Amendment of State Constitutions, 238, 239.

[6] In State ex rel. Johnson *v.* C. B. & Q. R. R., 195 Mo., 228 (1906), the State court held a State constitutional amendment invalid on Federal grounds which appear not well taken, but the decision was final. In the cases referred to above of constitutional amendments overcoming State decisions on State constitutional grounds, the Federal constitutional questions had already been settled by the United States Supreme Court.

Court, but would become so under the amendment proposed in this paper to the Federal Judicial Code.

But if a State law is declared invalid on both State and Federal grounds, what will be the situation if the Judicial Code is amended in accordance with the suggestion made above? Let us take again, by way of illustration, the situation presented by the recent decision of the New York court of appeals in the case of Ives *v.* South Buffalo Railway Co.[1] Here the decision is based on both State and Federal grounds, but in the conclusion of the opinion of the court Judge Werner said:

"How far these late decisions of the Federal Supreme Court [2] are to be regarded as committing that tribunal to the doctrine that any citizen may be deprived of his private property for the public welfare we are not prepared to decide. All that is necessary to affirm in the case before us is that in our view of the constitution of our State the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void."

And Chief Judge Cullen, in a concurring opinion, said that—

"The decision in the Noble Bank case is not controlling upon this court in the construction of the constitution of our own State." [3]

Clearly this decision is based in large part on the State constitution, and announces the view that "due process of law" in the State constitution is different from "due process of law" in the Federal Constitution. But both clauses are involved. As already suggested, this decision is, under present conditions, conclusive as to both State and Federal questions. But let us assume for the moment that the judicial code has been extended so as to give the United States Supreme Court power to review State decisions on Federal questions, irrespective of whether the decisions below were in favor of or opposed to the Federal ground set up, and that an amendment to the State constitution expressly authorizes compulsory workmen's compensation.[4] The State court, if it again holds the State enactment invalid, must do so on Federal grounds alone, and the enlarged right of review would permit the case to be taken promptly to the United States Supreme Court for a final decision of the Federal question.

But the original decision having been based on both State and Federal grounds, is there no way by which the Federal question alone may be presented to the United States Supreme Court for review and a decision obtained as to the State's powers under the Federal Constitution before the State resorts to the long and cumbersome process of amending its constitution? For before resorting to the amending process a State would prefer, if possible, to know whether an amendment will be worth while or whether the proposed legislation will be held by the United States Supreme Court to be a violation of the Federal Constitution. Now, inasmuch as a Federal question was directly passed upon in Ives *v.* South Buffalo Railway Co., let us suppose that Ives seeks to obtain a review by the Federal Supreme Court, again assuming that the judicial code has been amended so as to confer jurisdiction where the decision of the State court was in favor of the Federal right set up and against the validity of the contested State law. What would the United States Supreme Court do under the principle of Murdock *v.* Memphis? It would dismiss the writ of error for the reason that there was sufficient non-Federal ground to sustain the decision of the State court, and the question of Federal constitutional law would remain undetermined.

The Federal Supreme Court will decline to consider the Federal question where a non-Federal question is found to furnish a sufficient basis for the State decision. A State "due process" clause and the Federal "due process" clause being both made the basis of decision in the State court, the non-Federal ground is sufficient for the disposition of the case, and the United States Supreme Court would decline, for this reason, to exercise its power of review. And the non-Federal ground being clearly sufficient to support the case, the Federal question may be considered merely a moot question upon which Congress, under the principle of the separation of powers, has no authority to require a decision by the United States Supreme Court. A suggestion made by the minority of the court in Murdock *v.* Memphis presented another possible way of having the United States Supreme Court review the Federal question on a writ of error, even though the non-Federal question were sufficient to dispose of the case. Here three members of the court contended that the judiciary act as altered in 1867 brought the whole case decided in the State court to the United States Supreme Court for review, and that if the Federal question were found to be wrongly decided all questions, whether Federal or non-Federal, should be subject to review. In such a view all Federal and also all State questions might be reviewed. But the majority of the

---

[1] 201 N. Y., 271 (1911).
[2] In bank guaranty cases, Noble State Bank *v.* Haskell, etc., 219 U. S., 104–127 (1911).
[3] 201 N. Y., 271, 298, 317, 319.
[4] In New York proposals to amend the State constitution are already under way.

court took the view that such an enlargement of the power of review was not intended by the act of 1867. Suppose, however, that Congress should clearly enact that in cases brought to the United States Supreme Court on writ of error from State courts all questions, both Federal and non-Federal, should be subject to review. This would quite clearly extend the appellate power of the Federal Supreme Court over purely State questions not covered by the constitutional grant of jurisdiction to the Federal courts, and it is doubtful whether the mere presence of a Federal question in the case could be relied upon to give power to pass upon questions not otherwise within the jurisdiction of the United States Supreme Court.[1]

It may be said, then, to be very doubtful whether jurisdiction can be vested in the United States Supreme Court, on writ of error to a State court, to consider a Federal question when the State decision may properly be sustained on non-Federal grounds alone. But in a great number of cases, in which State courts declare laws invalid, the question of Federal constitutional law is bound up with that of State constitutional law. As to such cases, the proposed amendment to the Federal Judiciary Code would accomplish merely this: Should a State constitutional amendment be adopted for the purpose of overcoming a State decision, a subsequent State decision holding such an amendment to be a violation of the Federal Constitution would be subject to review by the United States Supreme Court. A final decision of the highest Federal court as to Federal constitutional questions could be obtained in two classes of cases: (1) Those in which the original State decision adverse to State authority is based solely or primarily on Federal constitutional grounds. (2) Those in which a State enactment has been placed in the State constitution, so that it is necessary that a State judicial decision adverse thereto be based entirely on Federal constitutional grounds.

And this would accomplish, in great degree, the desired result of making the United States Supreme Court the final interpreter of the Federal Constitution. The difficulties presented by a double series of identical or almost identical constitutional limitations are not overcome, and in each case a State decision on State constitutional grounds may have to be overcome by a long and cumbersome process of State constitutional amendment. Again, in a number of States the machinery for constitutional amendment is so cumbersome as to be practically unworkable, and in such States the people may be practically helpless, no matter how narrow an attitude the State courts may take in the interpretation of the State constitutions. But such cases are not numerous, and in all the States a fair degree of ease in altering State constitutions may finally be attained. Better still, the States, in amending their constitutions or in framing new constitutions, may omit from them the broad guaranties of "due process" and "equal protection of the laws." As has been suggested above, such guaranties in our State constitutions have proven useless, and worse than useless, since the nationalization of private rights by the Fourteenth Amendment of the Federal Constitution.[2]

SUPPLEMENTAL NOTE.

The Constitution says that "the judicial power [of the United States] shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority." It may be argued that Congress has no power to extend the jurisdiction of the United States Supreme Court to hear cases on appeal from State courts, as suggested in this article; that the person against whom the Federal constitutional question is set up and against whom that question is decided in the State court has no case arising under the Con-

[1] The point referred to in the text above is simply that as to whether congressional legislation can vest in the United States Supreme Court power to review all questions presented in a case coming from a State court by a writ of error, and in thus reviewing all questions presented, either State or Federal, to review the decision in so far as it is based on Federal ground, even if there be sufficient non-Federal ground. The position of the minority in Murdock *v.* Memphis, however, is broader than this and lends support to the notion that where a Federal question is involved sufficient to give jurisdiction on writ of error to the highest State court, Congress may confer upon the United States Supreme Court power to determine finally the State questions involved, to interpret for itself independently the constitutions and laws of the States, even though in their interpretation no Federal question is involved. The United States Supreme Court declined to pass upon the question as to whether this may be done (20 Wall., 633, 641). Should the view of the minority in this case ever be adopted, and should Congress expressly extend the United States Supreme Court's power of review in accordance therewith, the State courts would be to a large extent displaced as final interpreters of State constitutions.

[2] This article was prepared during the summer of 1911 at the suggestion of some Members of Congress who had become interested in the proposed amendment of the Federal Judicial Code. A recommendation identical to that contained in this article was made to the American Bar Association during the latter part of August by its special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation; and this recommendation was unanimously approved. The American Bar Association, therefore, now stands committed to the proposal to strike from section 237 of the Federal Judicial Code the limiting words which are italicized on page 291 of this article, and bills for this purpose are now pending in the Senate and House of Representatives.

stitution of the United States, because he has no right which is granted or safeguarded by Federal constitutional law. It is extremely doubtful whether the words "cases arising under the Federal Constitution" can be so limited as to mean "cases involving rights granted by the Federal Constitution." To illustrate again by the case of Ives *v.* South Buffalo Raliway Co., assuming that only a Federal question is involved, the argument suggested above would be as follows: Ives claimed no right which is granted or safeguarded by the Federal Constitution; he merely claims under a State law, and his claim is based entirely upon rights sought to be conferred by that State law. The law has been declared unconstitutional by the State court as a violation of the Federal Constitution, it is true, but it is urged that he has no case arising under the Federal Constitution, because he has no right which is granted by that instrument. But he has a claim the determination of which depends upon the Federal Constitution, and if he had an appeal to the United States Supreme Court that court would dispose of the case finally. There is clearly "a case arising" under the Constitution of the United States, as this language is ordinarily used; for there is a case involving a final interpretation of the Federal Constitution, and one the decision of which determines rights at issue between the parties to the suit.

"What constitutes a case thus arising was early defined in the case cited from 6 Wheaton—Cohen *v.* Virginia. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either." (Justice Strong, speaking for the court in Tennessee *v.* Davis, 110 U. S., 257.)

But even if the language of Article III, section 2, does not expressly include such a case, this is not conclusive as to the Federal power to enlarge the appellate power of the United States Supreme Court, as referred to above. Congress has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." (Art. I, sec. 8.) It would be appropriate under this clause for Congress by legislation to assure the uniform interpretation of the Federal Constitution, and to prevent one's being deprived of rights by an erroneous interpretation of the Constitution in a State case. In this way would be guaranteed the supremacy of Federal law expressly provided for by Article VI, and clearly implied throughout the United States Constitution.

The question here raised has never been passed upon and can not arise so long as the judicial code remains as it is now, but in Martin *v.* Hunter's Lessee and Cohen *v.* Virginia decisions were based in part upon the importance of having a uniform interpretation of the Federal Constitution and laws, and the obtaining of such a uniform interpretation in cases involving the Federal Constitution is within the implied if not within the express powers of Congress. If the power to enact such a law may be said to be one within the competence of Congress, a case arising under it then is clearly one "arising under" the Constitution or laws of the United States

INDEX.

32966—12——5